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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RUSS BUILDING PARTNERSHIP,
a California general partnership,
Appellant,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, *et al.*,
Appellees.

On Appeal from the Court of Appeal of the State of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. May a city, consistent with the Takings Clause, coerce a property owner to pay, as a condition of developing and occupying property, a "fee" for future municipal services that exceeds any reasonable estimate of the cost of the services attributable to the development?

2. May a city avoid the Takings Clause by using a "debatable rational basis" to set the amount of a fee in excess of any reasonable estimate of the cost of the future municipal services to be provided?

3. Does the Due Process Clause prohibit a city from charging a property owner an excessive "fee" purporting to represent public transit costs for a 45-year period?

4. Does the Equal Protection Clause prohibit a city from singling out particular property owners to bear the cost of public transportation?*

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* In addition to the parties named in the title of this jurisdictional statement, Pacific Gateway Associates Joint Venture, Crocker National Bank, and Crocker Properties, Inc., were plaintiffs in the consolidated proceedings below (infra, p. 5) and, accordingly, are appellees in this appeal.

Appellant Russ Building Partnership is a California general partnership consisting of the Shorenstein Investment Company, the Swig Investment Company, and the Weiler-Arnow Investment Company, as partners. Appellant appeared on behalf of itself and all other similarly situated owners and developers of property within the "Downtown Area" defined in Ordinance No. 224-81 of the City and County of San Francisco.

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a California general partnership,
Appellant,

vs.

CITY and COUNTY OF SAN FRANCISCO,
a municipal corporation, *et al.,*
Appellees.

On Appeal from the Court of Appeal of the State of California

JURISDICTIONAL STATEMENT

Appellant Russ Building Partnership appeals from a final judgment of the Court of Appeal of the State of California. The San Francisco "Transit Impact Development Fee Ordinance" imposes a "fee" of $5 per square foot on new office buildings in a defined downtown district, ostensibly to offset burdens placed on public transportation by that new construction over a 45-year period in the future. Appellant attacked the Ordinance on state and federal grounds, including that the fee was a "special tax" under California law because it exceeded the reasonable cost of the service for which it was imposed. The trial court refused to consider whether the amount of the fee was reasonably related to the burden caused by new office construction, but instead reviewed the Ordinance under a wholly illusory standard, ruling that the fee would be upheld "unless there is a complete absence of even a debatable rational basis for the legislative determination" (Appx. D., p. 5). Based on its view that the amount of the fee was

"debatably rational" (see Appx. A, p. 3), and that the purpose of the fee was "reasonably related to [a] permissible legislative objective" (Appx. D, p. 8) the court upheld the Ordinance under the Takings Clause, Due Process Clause, and Equal Protection Clause. The court of appeal affirmed, holding that the imposition of the fee is not an unconstitutional taking of appellant's property, and that the Ordinance does not violate the Due Process Clause or the Equal Protection Clause. The California Supreme Court refused review.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Five ((1987) 188 Cal.App.3d 977), is printed in Appendix A. The order of the Supreme Court of the State of California denying review of the court of appeal's decision is printed in Appendix B.

The following other opinions were rendered in the case: The initial order of the Supreme Court of the State of California granting review of the court of appeal's decision is printed in Appendix C—this order was later modified by the order denying review (Appx. B); the opinion of the Superior Court of the State of California, City and County of San Francisco, is printed in Appendix D.

JURISDICTION

The opinion of the Court of Appeal of the State of California was filed and entered on January 20, 1987 (Appx. A), and the order of the Supreme Court of the State of California denying review was filed and entered on June 3, 1987 (Appx. B). A notice of appeal to this Court was timely filed in the court of appeal on August 28, 1987 (Appx. E).

This Court has jurisdiction pursuant to § 1257(2) of Title 28 of the United States Code. The court of appeal decided that the Ordinance was not an unconstitutional taking of plaintiff's property or violation of due process (Appx. A, p. 9), and that "the

Ordinance does not violate equal protection standards" (Appx. A, p. 9).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

"[N]or shall private property be taken for public use, without just compensation."

Fourteenth Amendment, section one, United States Constitution:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent provisions of the San Francisco Transit Impact Development Fee Ordinance are printed in Appendix F and, as amended, in Appendix G.

STATEMENT OF THE CASE

Appellee City and County of San Francisco enacted the Transit Impact Development Fee Ordinance in 1981 (Appx. A, p. 1). As a condition of occupancy, the Ordinance requires owners of new office buildings in a defined district in downtown San Francisco to pay a "fee" of $5 per square foot of floor area, ostensibly to offset the "incremental financial burden" imposed upon the City's public transit system in serving the new riders generated by each new building over 45 years, the assumed average life of new buildings (Appx. F, p. 3). The fee is extracted only from owners of new office space (Appx. F, pp. 1, 2); owners of all existing buildings and of new apartments, condominiums, or other residences anywhere in the City are not affected. The Ordinance also

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[1] "Where the state court has considered and decided the constitutional claim, we need not consider how or when the question was raised" (*First English Evan. Luth. Ch. v. Los Angeles Cty.* (1987) 107 S.Ct. 2378, 2385, n. 8, ____ U.S. ____).

excludes retail stores, even those in the downtown area. (Appx. G, p. 4)

In adopting the Ordinance and fixing the amount of the fee, the City did not attempt to forecast either the cost of transit service per passenger or the demand for transit service generated by office space for 45 years in the future. Instead, the City purported to estimate just one year's (1980-1981) marginal net cost (capital and operating costs that are not offset by transit fares) per passenger, multiplied that number by the estimated average number of new passengers per square foot of office space in 1980-1981, and extrapolated the result for 45 years applying a discount rate (Appx. D, p. 25).[2]

Appellant Russ Building Partnership, representing a class of 6,000 property owners, brought suit in the California superior court to have the Ordinance declared invalid on its face and as applied, on the grounds, among others, that it violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Appx. D, p. 2). Appellant alleged that the extrapolation of one year's results for 45 years into the future is mere arbitrary speculation,[3] and

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[2] Since the Ordinance conceives of "net cost" per passenger as the excess of costs (capital and operating) over the revenues received by the transit system through passenger fares (Appx. G, p. 5), it is clear that the "net costs" that the City is seeking from office building owners are simply that portion of transit costs that the City has decided not to charge the actual transit users (infra, p. 12).

[3] The City presumes that the number of transit passengers generated per square foot of office space in 1980-1981 and the marginal net cost per new passenger in 1980-1981 will remain constant for 45 years (Appx. D, p. 25). This in turn assumes that cost of transit equipment, labor, power, fuel, construction and overhead, together with travel patterns to and from downtown and transit use per square foot of office space all will remain unchanged throughout 45 years, or that any variance in one element will be offset by variances in the opposite direction in other elements. It also involves a similar presumption with respect to the transit fare structure (i.e., the level of cash fares, the level of monthly discounted fares, and the proportion of passengers using monthly discount passes).

further that the City unreasonably overstated the net costs for the extrapolated year.

The case was consolidated at trial with two similar actions brought by other property owners (appellees Pacific Gateway Associates Joint Venture, Crocker National Bank, and Crocker Properties, Inc.), except as to certain "vested rights" claims asserted in those other actions (Appx. D, p. 3). The other plaintiffs in the consolidated trial had raised the Takings Clause issue. In appellant's request for oral argument and for statement of decision (Clerk's Transcript on Appeal, p. 1530) and in its specification of controverted issues proposed for inclusion in the statement of decision (Clerk's Transcript on Appeal, p. 1545), appellant likewise requested the superior court to address "[w]hether the [Ordinance] is a taking of property in violation of the Fifth Amendment of the United States Constitution" (Clerk's Transcript on Appeal, pp. 1530, 1545).

After a court trial, the superior court held that "[a]n ordinance will be upheld under the Police Power unless there is a complete absence of even a debatable rational basis for the legislative determination" (Appx. D, p. 5). The superior court did not consider whether the City's transit cost estimates were reasonable and, a fortiori, did not determine what was the relationship between the fee imposed and any reasonable estimate of transit costs that would be caused by the development. It concluded only that various of the City's estimating methodologies had a "rational" or "debatable rational" basis (Appx. D, pp. 13, 17, 18, 25).

The California court of appeal affirmed.[4] On April 30, 1987, the California Supreme Court granted petitions for review in the consolidated cases, but specified certain issues to be heard, which did not include the takings issue (Appx. C). On June 3, 1987, the California Supreme Court modified its prior order, and denied the petition for review in appellant's case (Appx. B).

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[4] The cases were consolidated on appeal for oral argument and decision (Order of court of appeal granting motion to consolidate (May 19, 1986)).

THE QUESTIONS ARE SUBSTANTIAL

This case is of crucial importance to property owners and cities throughout the country. The courts below have upheld a city's attempt to coerce property owners to pay, as a condition of developing and occupying their property, an exorbitant "fee," without a determination by the courts whether the amount of the fee exceeds a reasonable estimate of the cost of the burden caused by the developments. Instead, the fee was tested only under a "debatably rational" standard of review that is wholly illusory and gives cities carte blanche to coerce some property owners into paying "fees" that have no reasonable relationship to the costs of additional municipal services allegedly necessitated by the proposed development.[5] The court below has created a dangerous precedent by approving the City's attempt to prohibit a lawful development unless and until the owner agrees to pay an arbitrarily set "fee" in excess of the costs incurred by the City.

This is not a case involving an exaction " '*substantially* advanc[ing]' the 'legitimate state interest' sought to be achieved" (*Nollan* v. *California Coastal Com'n* (1987) 107 S.Ct. 3141, 3147, n. 3, ____ U.S. ____)—indeed, as discussed below (infra, pp. 9-10), the exaction contradicts the government's expressed interest in limiting fees to reasonable costs. Whatever the justification for setting a reasonable fee to offset an incremental financial burden imposed upon municipal services by new building (Appx. F, p. 3), there is no justification for demanding a "fee" that substantially exceeds the cost of the services to be provided. Such exorbitant fees by their nature do not advance legitimate

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[5] There was no evidence before either the City board of supervisors (which adopted the Ordinance) or the trial court as to what San Francisco's transit costs or revenues would be over a 45-year period, nor any evidence as to usage of the transit system by office workers four decades in the future. Moreover, there was no attempt to show that the 1980-1981 costs or revenues were representative of costs or revenues over a 45-year or any other period; to the contrary, it was undisputed that the variables would change. Indeed, by structuring the Ordinance so that the costs to be covered are those to be incurred over a 45-year period in the future, the City has created a situation where the true facts cannot be known.

state interests. Instead, they are devices resorted to by cities to raise money—without the limitations involved in an exercise of the taxing power.[6]

The crux of the ruling below is the trial court's erroneous view that any method for calculating a development fee that is "debatably rational" is valid. As a practical matter, the illusory "debatably rational" standard will eliminate the Takings Clause as a restraint on the amount of fee exactions imposed by cities. For example, the trial court found a "debatable rational basis" for the City's method of estimating net costs (capital and operating costs in excess of revenues) which excluded revenues attributable to office building usage that were generated at off-peak hours of the transit day. The "debatable rational basis" was that the City could then use those revenues to recoup losses otherwise incurred during off-peak hours, even though it was undisputed that downtown office building usage did not contribute to off-peak losses (see Appx. D, pp. 16-17).[7]

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[6] Here, for example, the California Constitution requires approval of a special tax by two-thirds of the electorate (Appx. A, p. 3). The court of appeal held that the fee imposed by the City was not a tax (Appx. A, pp. 3-6). If the City's "fee" is not a tax, the Takings Clause requires that its amount be reasonably or substantially related to the cost of providing transit service to the additional riders generated by a new building.

[7] The City also unreasonably assumed (contrary to fact) that no capital grants for new service would be made for 45 years and, on that basis, required owners of new buildings to pay a fee to cover capital costs which are in fact paid by federal and state grants (App. D, pp. 12-13), which were so paid throughout nearly 20 years before 1980-1981, and which have been so paid in subsequent years. Capital costs covered by such grants account for more than half of the City's estimate of transit costs per square foot of office space (Trial Exhibit 54, p. 34). The basis for disregarding the capital grants is a provision in the Ordinance—which applies to capital grants *only*—that they not be considered unless their receipt is "reasonably probable" (Appx. G, p. 5). However, the trial court did not apply a "reasonably probable" standard but found only that there was a "debatable rational basis" for assuming that no capital grants for expansion would be made for 45 years (Appx. D, p. 13). The debatable rational standard thus allows the City to either

Similarly, the "debatable rational basis" for a 45-year estimate of costs included the rationalization that, although the court recognized "there will be no way of knowing" whether the fee is too high or too low (Appx. D, p. 24), "[t]he City and developers are equally at risk of the fee being too low on the one hand or too high on the other" (Appx. D, p. 24).

There is something seriously wrong when a "debatable rational" standard is applied in reviewing the validity of an exaction imposed as the quid pro quo for permitting particular development. Given the breadth of a city's power under a "debatable rational" standard, the result of the ruling below would be that the Takings Clause will simply disappear. But this Court in *Nollan v. California Coastal Com'n.* (1987) 107 S.Ct. 3141, 3147, n.3, ____ U.S. ____, rejected the application of a mere rationality test in Takings Clause cases and emphasized that a measure must "*substantially*" advance a legitimate state interest. The courts in such cases must examine whether exactions exceed amounts that substantially advance a legitimate state interest, especially where, as here, there is a heightened risk that the fees are imposed on certain property owners as a substitute for funding public services through taxes. In this case, the "fee" required as the quid pro quo for development of a new building never passed the test of whether it was limited to the reasonable cost of the transit service to be provided to the new building's occupants. The ruling below thus sanctions the use of land-use regulation to exact the payment of exorbitant development "fees" from a few property owners as a revenue-raising measure.

A summary dismissal or affirmance by this Court would convert the ruling below into a precedent binding upon all other courts (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 344-345).

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exclude or include, virtually at its whim, any cost or revenue in calculating the amount of the fee.

I

THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION: WHETHER A CITY MAY CIRCUMVENT THE TAKINGS CLAUSE BY CONDITIONING A LAWFUL DEVELOPMENT OF PROPERTY UPON PAYMENT BY THE OWNER OF A "FEE" THAT EXCEEDS ANY REASONABLE ESTIMATE OF THE COST OF THE BURDEN CAUSED BY THE DEVELOPMENT.

The ruling below—which endorses, as a condition to the lawful development of property, the exaction of a fee unreasonably in excess of any real public transit costs caused by the development—violates the Takings Clause of the Fifth Amendment, as incorporated against States by the Fourteenth Amendment.

In *Nollan* v. *California Coastal Com'n*(1987) 107 S.Ct. 3141, ____ U.S. ____, this Court held that a condition imposed for a land-use permit violates the Takings Clause unless it "substantially advance[s] legitimate state interests" (107 S.Ct. 3146; quoting *Agins* v. *Tiburon* (1980) 447 U.S. 255, 260). Assuming that the City has a legitimate interest in offsetting the "incremental financial burden" imposed upon its public transit system in serving the new riders generated by new buildings (Appx. F, p. 3), there is no nexus between that objective and a fee which greatly exceeds any reasonable estimate of that financial burden.[8]

The purported "legitimate state interest" articulated in the Ordinance is the exaction of a fee "which is related directly to the incremental financial burden imposed" upon the City's transit system by new development (Appx. F, p. 3). California law requires that a development fee "not exceed the reasonable cost of providing the service * * * for which the fee is charged" (California Government Code, §§ 50076, 50076.5) without ap-

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[8] Cf. *Norwood* v. *Baker* (1898) 172 U.S. 269, 279 (with respect to assessments, "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation").

proval by the electorate. A fee which exceeds the reasonable cost of providing transit service necessitated by new buildings cannot "substantially advance" that legitimate state interest. Nevertheless, the courts below upheld the Ordinance under the Takings Clause (as well as under California law) without ever considering whether the amount of the fee exceeded any reasonable estimate of the burden caused by new development.[9]

By setting the amount of the "fee" at an exorbitant level that was found only to have a "debatably rational" nexus to the burden on public transportation caused by the proposed development, the Ordinance "converts [its stated] purpose to something other than what it was" purported to be (*Nollan* v. *California Coastal Com'n* (1987) 107 S.Ct. 3141, 3148, ____ U.S. ____). The owners of the new buildings will bear the burden not only of providing transit service to new riders generated by their development but also of providing extra revenue for unrelated transit service:

> "[T]he exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the [governmental service]. Indeed, '[t]he Fifth Amendment's guarantee * * * was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'" (*Webb's Fabulous Pharmacies, Inc.* v. *Beckwith* (1980) 449 U.S. 155, 163; quoting *Armstrong* v. *United States* (1960) 364 U.S. 40, 49).

While the trial court asserted that the Ordinance had a "debatable rational basis" (Appx. D, pp. 13, 17, 18, 25), it failed to come to grips with the constitutionally mandated standard—whether the amount of the fee was reasonably related to

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[9] The court of appeal said that whether the City's methodology in calculating the transit fee "was economically justifiable and financially and scientifically sound was a question of fact for the trial court, whose conclusion must be upheld if supported by substantial evidence" (Appx. A, p. 17). But the trial court had found only that the City's estimating methodologies had a rational, or a "debatable rational" basis and refused to address whether the fee exceeded a *reasonable* estimate of the transit costs in question (Appx. D, pp. 13, 17, 18, 25).

the cost of providing transit service to the new riders generated by new buildings. Under the trial court's reasoning a new building that causes even a de minimus increase in transit usage could be charged a fee of any amount, whether $5 or $500 per square foot.

The court of appeal's affirmance was erroneous and necessarily based on the trial court's application of the "debatably rational" standard. No legal authority suggests that a fee that has a "debatable rational" basis necessarily has a reasonable basis. To find that the Ordinance is a "'debatably rational' development fee" (Appx. A, p. 3) is only to say that it is *arguable* that the fee is rational. This limited inquiry is illusory in connection with a cost calculation. The "debatably rational" test does not satisfy the requirement under the Takings Clause that an exaction must be reasonably related to the burden imposed by a development in order to "substantially advance" a legitimate state interest. Any hypothesis that the Ordinance is "debatably rational" is barred by this Court's view that the Takings Clause requires substantial advancement of a legitimate state interest rather than "an exercise in cleverness and imagination" (*Nollan* v. *California Coastal Com'n* (1987) 107 S.Ct. 3141, 3150, ____ U.S. ____; see also *National Cable Television Assn.* v. *U.S.* (1974) 415 U.S. 336, 343 (noting where "some of the costs inured to the benefit of the public," it is not enough "to contrive a formula that reimburses the [Federal Communications] Commission for that amount "of the total cost")).

While *Nollan* v. *California Coastal Com'n* (1987) 107 S.Ct. 3141, ____ U.S. ____, does not elaborate on what constitutes a "substantial" advancing of a legitimate state interest, the *Nollan* standard certainly is not satisfied by review that allows fees to be set in any amount that has a "debatable rational basis." This important issue should be resolved by this Court.

II

THE RULING BELOW—THAT A CITY MAY CHARGE A PROPERTY OWNER A "FEE" PURPORTING TO REPRESENT PUBLIC TRANSIT COSTS FOR A 45-YEAR PERIOD— INVITES CITIES TO DEMAND EXCESSIVE EXACTIONS IN VIOLATION OF THE DUE PROCESS CLAUSE.

Principles of due process require that an "imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured" *(Nashville, C. & St. L. Ry.* v. *Walters* (1935) 294 U.S. 405, 429; see also *Williamson Planning Comm'n* v. *Hamilton Bank* (1985) 473 U.S. 172, 197 (noting theory that a "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment")). The Ordinance is unreasonable and arbitrary in charging owners of new office buildings for the cost of public transportation for 45 years in the future. New buildings that are subject to the Ordinance will generate taxes during the next 45 years, without regard to the fact that the builders initially paid the transit fee under the Ordinance. Under the reasoning of the court of appeal, the owner of a new building (whether home, office or store) could be required, as a condition of obtaining a permit, to pay a "fee" to cover 45 years, or more, of any future governmental service, e.g., police, fire, street lighting, or public transit—all of which are provided to the public at large and are supported by taxes.

Moreover, no one knows or can know what the City's transit revenues or costs will be during a 45-year period—they are the result of political decisions as to the level of fares and the quality and level of service. It is unreasonable and arbitrary to single out owners of new downtown offices, rather than taxpayers or transit riders, to underwrite the City's decisions to keep fares low.

III

AN ORDINANCE THAT SINGLES OUT PARTICULAR PROPERTY OWNERS TO BEAR THE COST OF PUBLIC TRANSPORTATION VIOLATES THE EQUAL PROTECTION CLAUSE.

The ruling below also erroneously rejected appellant's claim that the City has arbitrarily singled-out owners of one type of property—new office buildings in a particular part of San Francisco—to pay a "fee" (Appx. A, pp. 8-9).[10] The Ordinance is an attempt to shift the burden of paying for public transportation from taxpayers and passengers (who are not paying the full costs of transit services) to a relative handful of property owners. A fee based on irrational or arbitrary classifications cannot withstand equal protection scrutiny (see *Delaware River Basin Com'n* v. *Bucks County, etc.* (3 Cir. 1981) 641 F.2d 1087).

> "If [the plaintiffs] were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other * * * landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause" (*Nollan* v. *California Coastal Com'n* (1987) 107 S.Ct. 3141, 3147, n. 4, ____ U.S. ____).

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[10] As noted (supra, pp. 3-4), the Ordinance excludes retail stores in the downtown area, even though there will be extensive retail development over the next several years in portions of the downtown area, and peak-period transit use for retail stores is as high or higher than for office buildings (Reporter's Transcript on Appeal, pp. 2441-2442, 2448-2449, 2451-2452; Trial Exhibit 26, pp. 11-17).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix A

[No. A030997. First Dist., Div. Five. Jan. 20, 1987.]

Russ Building Partnership, Plaintiff and Appellant, v.
City and County of San Francisco, Defendant and Respondent.

[No. A033493. First Dist., Div. Five. Jan. 20, 1987.]

Pacific Gateway Associates Joint Venture, Plaintiff and Appellant, v.
City and County of San Francisco, Defendant and Respondent.
Crocker National Bank et al., Plaintiffs and Appellants, v.
City and County of San Francisco, Defendant and Respondent.

LOW, P. J.—We hold that the San Francisco Transit Impact Development Fee Ordinance is valid. It may not be applied retroactively as to Pacific Gateway Associates Joint Venture, Crocker National Bank and Crocker Properties, Inc.

In this consolidated appeal, plaintiff Russ Building Partnership[1] (hereafter Russ Building plaintiff), and plaintiffs Pacific Gateway Associates Joint Venture (Pacific), Crocker National Bank (CNB), and Crocker Properties, Inc., (hereafter collectively Crocker plaintiffs) appeal from a judgment upholding the validity of San Francisco's Transit Impact Development Fee Ordinance (the Ordinance). They contend that the trial court erred (1) in treating the Ordinance as a development fee and (2) in finding that the Ordinance could not be successfully challenged under articles XIII A and XIII B of the California Constitution, or the equal protection and due process clauses of the federal and state Constitutions.

In May 1981, the City and County of San Francisco (city) enacted Ordinance No. 224-81 "[i]n order to be able to provide public transit services for new development in the downtown area . . . ." The Ordinance requires that the owners of buildings located in downtown San Francisco which contain newly devel-

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[1] The Russ Building Partnership filed a class action against defendant City and County of San Francisco on behalf of approximately 6,000 similarly situated property owners in downtown San Francisco.

oped office space, who have not yet received a building permit or a certificate of completion prior to the effective date of the Ordinance, pay a transit fee as a condition of issuance of a certificate of completion and occupancy. The fee is designed to provide revenue for the San Francisco Municipal Railway system (Muni) to offset the anticipated increased costs to accommodate the new riders during peak commute hours generated by the construction of new office space in the downtown area. The San Francisco Board of Supervisors fixed the fee to be paid by property owners at a maximum of $5 per square foot of new office space.[2]

Under the Ordinance, the transit fee is payable by each building's owner in a lump sum at the end of construction. Alternatively, the owner may choose to amortize the fee over several years and make installment payments. The amount of the fee assessed is to cover increased transit costs which the city predicts will be generated over the 45-year life of each office building. There is no provision for adjusting the amount owed by each owner depending on the actual "life" of the building or actual transit operation costs. The board of supervisors may, however, adjust the $5-per-square-foot figure for future developers, depending on changing conditions.

In May 1981, Russ Building plaintiff filed a class action suit against the city to have the Ordinance declared invalid on its face and in its application. Another suit was filed against the city by Crocker plaintiffs, who additionally challenged the retroactive application of the Ordinance. The two cases were consolidated for trial of common issues.

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[2] One of the city's consultants, Bruce Bernhard, manager of the analysis unit of the San Francisco Public Utilities Commission Bureau of Finance, estimated the increased transit costs attributable to new riders as $9.18 per square foot in 1981. He later revised this figure to $6.57. Defendant city also employed the consulting firm of Touche-Ross in March 1983 to prepare a new estimate of increased incremental transit costs for use at trial. Touche-Ross's initial estimate was $8.71 per square foot; this estimate was later adjusted downward to $8.36.

The trial court entered judgment in favor of the city, finding that the Ordinance was not a tax and was a "debatably rational" development fee. It also found that the retroactive application of the Ordinance as against the Crocker plaintiffs was legal. Appeals were taken separately from the trial court's judgments and the cases have been consolidated for appeal before this Court.

I

Both sets of plaintiffs argue that the transit impact fee is not a legitimate development fee because the $5-per-square-foot fee exceeds the reasonable cost of the increased services to be provided, and thus is a "special tax" which must be approved by two-thirds of the electorate pursuant to California Constitution, article XIII A, section 4 (hereafter referred to as section 4). **(1)** Whether the transit fee is a development fee or a special tax is an issue of law. (See generally, *Heckendorn* v. *City of San Marino* (1986) 42 Cal.3d 481, 487 [229 Cal.Rptr. 324, 723 P.2d 64].)

Typically, a development fee is an exaction imposed as a precondition for the privilege of developing the land. Such fees are commonly imposed on developers by local governments in order to lessen the adverse impact of increased population generated by the development. (See *Candid Enterprises, Inc.* v. *Grossmont Union High School Dist.* (1985) 39 Cal.3d 878 [218 Cal.Rptr. 303, 705 P.2d 876] [school-impact fees]; *Associated Home Builders etc., Inc.* v. *City of Walnut Creek* (1971) 4 Cal.3d 633 [94 Cal.Rptr. 630, 484 P.2d 606, 43 A.L.R.3d 847] [dedication of land for park space or fee in lieu thereof].) This is one of the most common subjects of local police power regulations. (See *Trent Meredith, Inc.* v. *City of Oxnard* (1981) 114 Cal.App.3d 317, 325 [170 Cal.Rptr. 685].) " 'The position of the public entity is that this arrangement is only fair. The developer has created a new, and cumulatively overwhelming, burden on local government facilities, and therefore he should offset the additional responsibilities required of the public agency by the dedication of land, construction of improvements, or payment of fees, all needed to provide improvements and services required by the new development. . . .' " (*Ibid.*)

The question which remains is how does the transit fee imposed here differ from a "special tax" within the meaning of section 4. The distinction between a tax and other exactments is admittedly blurred—taking on a different meaning in different contexts. Our Supreme Court has defined "special taxes" in section 4 "to mean taxes levied for a specific purpose rather than a levy placed in the general fund to be utilized for general governmental purposes. (*City and County of San Francisco* v. *Farrell* (1982) 32 Cal.3d 47, 57 [184 Cal.Rptr. 713, 648 P.2d 935].)" (*Heckendorn* v. *City of San Marino supra,* 42 Cal.3d at p. 489.) In reaching this conclusion, the court held that the term must be strictly construed and ambiguities resolved so as to limit the situations to which the two-thirds requirement applies. (*City and County of San Francisco* v. *Farrell* (1982) 32 Cal.3d 47, 52 [184 Cal.Rptr. 713, 648 P.2d 935].) The court reasoned that a restrictive interpretation was necessary because of the inherently undemocratic requirement that the tax must be approved by a supermajority of the electorate. (*Ibid.*)

While the Ordinance in this case does exact a fee for a specific purpose—to fund the cost of providing for increased ridership caused by the development—the crucial inquiry is whether the transit fee is a tax at all. The definition in *Farrell* makes the distinction between types of taxes only. To ascertain whether the transit fee is a tax, we first turn to the purpose behind section 4, using the strict interpretation approach announced in *Farrell.*

A

California Constitution, article XIII A was enacted to provide effective real property tax relief. "[S]ections 3 and 4 combine to place restrictions upon the imposition of such taxes." (*City and County of San Francisco* v. *Farrell,* supra, 32 Cal.3d at p. 56.) One characteristic of a special tax is that it levies a fee to replace revenue for services which were affected by the reduction caused by article XIII A. (See *Heckendorn* v. *City of San Marino, supra,* 42 Cal.3d at p. 489.) In contrast, the transit fee imposed by the Ordinance is not intended to replace revenues lost as a result of article XIII A. It is triggered by the voluntary decision of the

developer to construct office buildings and is directly tied to the increase in ridership that this construction will possibly generate.

In *Terminal Plaza Corp.* v. *City and County of San Francisco* (1986) 177 Cal.App.3d 892 [223 Cal.Rptr. 379], the city enacted an ordinance which required residential hotel owners to make a one-for-one replacement of residential units which were lost through conversion or demolition as a condition for obtaining a building permit. In distinguishing this exactment from a special tax, the court concluded that "fees not exceeding the reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue purposes, have been considered outside the realm of 'special taxes.' [Citations.]" (*Id.*, at p. 906.)

The transit fees required by the Ordinance were limited to the estimated costs involved to serve the increased ridership. None of the transit fees are earmarked for general revenue purposes. Further, unlike most taxes, the fees imposed by this Ordinance are not compulsory but are exacted only if the developer voluntarily chooses to create new office space. (see *id.*, at p. 907; *Trent Meredith, Inc.* v. *City of Oxnard, supra,* 114 Cal.App.3d at p. 328.) Developers have been required to pay for streets, sewers, parks and lights as a condition for the privilege of developing a particular parcel. There is little difference between these public improvements and the benefit to the public from the increased transit services paid for by the transit fee. In all instances, there is an increased burden on public improvements by virtue of the development. Moreover, such a construction will not interfere with giving voters effective property tax relief, the central purpose behind article XIII A of the California Constitution. (*City and County of San Francisco* v. *Farrell, supra,* 32 Cal.3d at p. 56.)

In *Beaumont Investors* v. *Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227 [211 Cal.Rptr. 567], the reviewing court had to decide whether a "facilities fee" imposed for connection to the local water district system was a special tax. The developer argued that the fee exceeded the reasonable cost of construction of the water system improvements required by the development and is a special tax. The reviewing court agreed. It relied on Government Code section 50076. That section was part

of legislation enacted to implement article XIII A of the California Constitution. That section provides: "As used in this article, 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (Stats. 1979, ch. 903, § 1.) The court concluded that the People failed to sustain their burden of proving that the facilities fee did not exceed the reasonable value of the services for which it was collected. (*Beaumont Investors, supra*, at p. 238.)

Unlike *Beaumont Investors,* the city has undertaken numerous studies and has held public hearings to determine the reasonable cost of the increased transit services. To this end, the city hired consultants to project long term needs and costs of transit services. Similarly, in *J. W. Jones Companies* v. *City of San Diego* (1984) 157 Cal.App.3d 745 [203 Cal.Rptr. 580], the city imposed a "facilities benefit assessment" on undeveloped property as a condition of obtaining a building permit which partially financed various public services built to serve the anticipated population generated by the development. These public improvements included sewer, street and *transportation services,* among others. The court concluded this was not a special tax but a special assessment levied on property which was benefited by the public facilities. (*Id.*, at p. 758.)

Whether we term the transit fee a special assessment or a development fee, as applied in this context, the charge levied is directly related and limited to the cost of increased municipal transportation services engendered by the particular development, and it is not a "special tax" for purposes of section 4.

B

Plaintiffs also contend that the transit fee is a "proceed of taxes" within the meaning of California Constitution, article XIII B and is subject to its limitations. That provision places limits on the growth of appropriations at both the state and local government levels, and requires excess appropriations to be returned by a revision of the tax rate or fee schedules within the next two

years. (Cal. Const., art. XIII B, § 2; see *County of Placer* v. *Corin* (1980) 113 Cal.App.3d 443, 449 [170 Cal.Rptr. 232].) The "[p]roceeds of taxes" subject to the limitation is defined as "all tax revenues and the proceeds to an entity of government, from (i) regulatory licenses, user charges, and user fees to the extent that such proceeds exceed the costs reasonably borne by such entity in providing the regulation, product, or service . . . ." (Cal. Const., art. XIII B, § 8, subd. (c).) Plaintiffs claim that the transit fee imposed by this Ordinance is a user charge or fee subject to the limitation. We disagree.

The transit fee is not a special tax within the meaning of section 4 and is not within the ambit of California Constitution, article XIII A, and therefore is not the type of revenue intended to be controlled by article XIII B of the California Constitution. Moreover, it is imposed as a condition of development of real property, which is not a regulatory license, user fee or charge. For these reasons, we conclude that the transit fee is not a "proceed of taxes" within the meaning of article XIII B. (See also *City Council* v. *South* (1983) 146 Cal.App.3d 320, 334-335 [194 Cal.Rptr. 110].)

II

A

Plaintiffs claim that the Ordinance discriminates against owners of office buildings constructed after 1979, denying them access to government benefits on the same footing as owners of pre-1979 buildings, and that it arbitrarily singles out commercial buildings while giving retail stores in the downtown area a free ride.

Under an equal protection analysis, the transit fee as an economic regulation is presumed to be constitutional. (*Candid Enterprises, Inc.* v. *Grossmont Union High School Dist., supra,* 39 Cal.3d at p. 890.) Since developers are not a "suspect class" and development is not a "fundamental interest" (*ibid.*; see also *Trent Meredith, Inc.* v. *City of Oxnard, supra,* 114 Cal.App.3d at p. 328), we determine only whether the " ' "distinctions drawn by a challenged [Ordinance] bear some rational relationship to a conceivable legitimate state purpose." ' [Citations.]" (*Candid*

Enterprises, Inc. v. *Grossmont Union High School Dist., supra,* at p. 890.)

The stated purpose of the Ordinance is "to require developers of new [commercial office space] in the downtown area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway." (Ord. No. 224-81, § 38.3.) The impact fee is necessary because "[n]ew developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. (Ord. No. 224-81, § 38.2.) The "Downtown Plan Environment Impact Report" indicated that the expansion of downtown office space is expected to exceed that of downtown retail space by 110 percent. The city concluded that "[f]uture increases in demand for public transit service" will therefore be "attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods." (Ord. No. 224-81, § 38.2.)

Consistent with the purpose of the Ordinance, the owners of new office space are required to pay for additional public facilities, the need for which is generated by their development. That the existing buildings will indirectly benefit from improved services does not result in such inequity as to offend equal protection principles. (See *J. W. Jones Companies* v. *City of San Diego, supra,* 157 Cal.App.3d at p. 757.)

Likewise, the argument that retail stores, which are also responsible for increased ridership, somehow got a windfall also fails. The Ordinance imposes the fee on the projected ridership directly and reasonably arising from the new office space. The city may rationally conclude that office workers increase the need for transit services during peak hours. The conclusion that it is office space, and not retail stores, that is primarily responsible for the need for improved transit services is properly left to the sound discretion of the local governing body. Since the trial court found this determination to be reasonably arrived at, this Ordinance must be upheld as being directly and additionally related to legitimate governmental goals. (*Terminal Plaza Corp.* v. *City and County of San Francisco, supra,* 177 Cal.App.3d at p. 910.) The

trial court did not err in finding that the Ordinance does not violate equal protection standards.

B

Under a substantive due process analysis, "[a] law regulating or limiting the use of real property for the public welfare does not violate substantive due process as long as it is reasonably related to the accomplishment of a legimate governmental interest. [Citations.]" (*Id.*, at p. 908.) Plaintiffs maintain that it is unreasonable to force developers to underwrite public transit costs over a 45-year period.

There was no dispute that an office building has a useful life of 45 years and that over that lifespan it will generate additional passengers for Muni. Expert testimony demonstrated that long term cost projections are employed in a variety of contexts, such as the purchase of capital equipment, financing pension funds and evaluating long term bonds and stocks. Such long term projections have been approved in deciding how much park and recreational space should be set aside to accommodate an increased population 40 years into the future. (See *Associated Home Builders etc., Inc.* v. *City of Walnut Creek, supra,* 4 Cal.3d at p. 639.) This is true even though inflation and other variables may affect the accuracy of such projections. Based on the data used by the city's consultants, the trial court could properly conclude that the imposition of a lump sum fee representing increased transit costs over a 45-year period was not arbitrary or unreasonable and was not an unconstitutional taking of plaintiffs' property.

III

Our Supreme Court has held that "[d]ouble taxation occurs only when 'two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority within the same jurisdiction during the taxing period.' " (*Associated Home Builders etc., Inc.* v. *City of Walnut Creek, supra,* 4 Cal.3d at p. 642, quoting Rhyne, Municipal Law, p. 673.) In *Associated Home Builders,* it was determined that the requirement of land dedication for recreational use or the payment of

"in-lieu fees" as a precondition of approval for development was sufficiently different from a property tax so that no unconstitutional double taxation resulted. This case is dispositive of the issue before us. The Ordinance is a development fee, not a tax. (See discussion, pt. I A, *ante*.) It is charged one time, at the completion of construction of new office space, and does not recur as does a property tax. Furthermore, the transit fee is designed specifically to fund Muni maintenance and development, whereas a property tax provides general revenue to cover a wide range of municipal services.

Plaintiffs attempt to distinguish the facts of the *Associated Home Builders* case on the ground that the fee imposed there was calculated differently than the fee in the instant case. Relying on *Flynn* v. *San Francisco* (1941) 18 Cal.2d 210 [115 P.2d 3], they maintain that the transit fee is more akin to a property tax because both the transit fee and property taxes are calculated based on the number of square feet in the development. This argument is without merit. In *Flynn*, the city imposed a "license fee" on certain types of vehicles in addition to an ad valorem tax on these same vehicles. The license fee was unrelated to use of vehicles or any regulatory purpose. The court found that it was imposed only as an incident of ownership, as was the ad valorem tax, and constituted double taxation. (*Id.*, at pp. 214-215.) Regardless of the method of calculation, the transit fee is not imposed by virtue of property ownership, but is a fee for the privilege of developing real property and to defer increased costs of transit services. As such, it is identical to the fee imposed in *Associated Home Builders*. As a matter of law, the imposition of the transit fee does not result in double taxation.

IV

The Crocker plaintiffs separately contend that the enactment of the Ordinance violates section 3.598 of the San Francisco City Charter. That section provides that "[r]ates for each utility *except the municipal railway* shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility." (Italics added.) If

there is a deficit for "said utility," section 3.598 of the San Francisco City Charter authorizes the imposition of a tax levy approved by a two-thirds vote of the board of supervisors. Under section 3.598, rates for Muni are proposed by the San Francisco Public Utilities Commission and are "approved, rejected or amended by the board of supervisors."

The trial court found that the "charter section specifically excepts the Muni from the requirements of the section." The trial court was correct in concluding that a Muni transit fee is not subject to the constraints of the above-cited language of section 3.598 of the San Francisco City Charter. Reviewing the plain language of the Ordinance, the board is not required to make up Muni deficits by levying a tax. The trial court correctly determined that the transit fee imposed does not violate the charter provision.

Having concluded that the city may constitutionally enact the transit fee pursuant to its police power, we offer no opinion as to the wisdom of the fee itself or upon the legality of any other exaction. We are mindful of the local government's need to generate revenue to maintain the quality of life the residents of the city have come to expect. This has become increasingly difficult in the post-Proposition 13 era. The transit fee imposed falls within permissible bounds.

V

The Crocker plaintiffs next contend that the issuance of the building permits to them in July and September 1979, before the effective date of the Ordinance, prohibits the retroactive application of the Ordinance to their projects. The trial court agreed in part, finding that plaintiffs did acquire a vested interest to complete construction and to use their building in accordance with the terms of their permits. However, the trial court concluded that language conditioning issuance of the permit upon participation in some kind of transit funding mechanism put plaintiffs on notice that they might have to contribute for future transit service, and that the fee imposed herein could be reasonably anticipated from

that language. We find the evidence does not support this conclusion.

A

Once a property owner has "performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. [Citations.]" (*Avco Community Developers, Inc.* v. *South Coast Regional Com.* (1976) 17 Cal.3d 785, 791 [132 Cal.Rptr. 386, 553 P.2d 546]; see generally, *People* v. *H. & H Properties* (1984) 154 Cal.App.3d 894, 899 [201 Cal.Rptr. 687].) To take away or interfere with that right without due process of law is unconstitutional. Here, plaintiffs had been issued building permits, had begun construction and made a substantial financial commitment to their projects almost two years before the Ordinance was enacted. As such, they obtained a vested right to complete the buildings and occupy them under the conditions in existence when the original building permits issued.

Relying on *People* v. *H & H Properties, supra,* 154 Cal.App.3d at pages 899-900, the city argues that the vested rights doctrine does not apply because there is nothing improper in imposing new taxes on existing property. That reliance is misplaced. There, an ordinance required developers of a condominium conversion project to furnish relocation assistance to its tenants and to pay either moving costs or compensation for anticipated rent increases. A condominium developer had received tentative and final map approval to proceed with the conversion before the ordinance was enacted. The reviewing court rejected a claim that the ordinance unconstitutionally interfered with the developer's vested rights, reasoning that the ordinance did not constitute an additional condition precedent to completion of the project since no further approvals were necessary. (*Ibid.*) When viewed in that light, the court found no distinction between that developer and similarly situated property owners who were bound by the rent control ordinance. (*Id.*, at p. 900.) In addition, the court noted that if the project loses its attractiveness, the developers could pull out. (*Id.*, at p. 902.)

In the present case, plaintiffs are prevented from using and occupying the completed buildings until they pay their share of the transit fee.[3] The retroactive application of the fee certainly interferes with the plaintiffs' vested right to use the buildings as originally approved and cannot be compared to a tax or exaction which is imposed upon existing buildings. Furthermore, as we discussed above, the transit fee is not a tax but a development fee, and depending on the stage of completion, the size of the fee may seriously affect a developer's ability to proceed with the project. While the court in *H & H Properties* noted that developers of completed projects are free to withdraw from plans to convert apartments into condominiums, plaintiffs herein have little use for a partially completed project if they choose not to continue because of the burden of the fee imposed. In conclusion, we agree with the trial court that, as a legal matter, the retroactive application of the transit fee to plaintiffs' projects interferes with a vested right.

B

However, the city successfully argued that language in the building permits put plaintiffs on notice that they had to contribute to a funding mechanism, such as a transit fee. The permits issued to plaintiffs contained the following language: "In recognition of the need for expanded transportation services *to meet peak demand generated by cumulative office development in the downtown area, [plaintiffs] shall participate in a downtown assessment district, or similar, fair and appropriate mechanism,* to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City." (Italics added.)

Plaintiffs contended below that the italicized language could reasonably be interpreted to mean that *all* the buildings in the downtown area were to share the burden of increased transit costs regardless of when they were built, and that it is unreasonable to expect that only their buildings would be solely liable for the

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[3] Pacific Gateway's fee is estimated to be $2,422,060 and CNB and Crocker plaintiffs must pay $2,468,225.

increased transit fee for the next 45 years. They add that the transit fee is dissimilar from the assessment district mechanism and that the foregoing language did not give sufficient notice of the nature of the fee or the amount.

Whether the language provided plaintiffs adequate notice is a question of law. (See generally, *Mullane* v. *Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314, 319-320 [94 L.Ed. 865, 873, 876, 70 S.Ct. 652]; *Horn* v. *County of Ventura* (1979) 24 Cal.3d 605, 616-618 [156 Cal.Rptr. 718, 596 P.2d 1134].) The city is incorrect in contending that we review the trial court's conclusion under the substantial evidence test. In this matter, it is necessary to decide only what is the legal effect of the evidence as found by the trial court. Having resolved any dispute in the evidence concerning what the parties knew at the time the building permits issued in favor of the judgment, the question whether this evidence constituted reasonable notice is one of law. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 290, p. 302.)

In arriving at its conclusion, the trial court relied on the evidence that the planning commission was considering a number of alternative funding mechanisms, which included a development fee, and that the commission did not intend to limit the possible mechanisms, and so included broad language in the permits. However, the trial court failed to find that this information was communicated to the plaintiffs or that the plaintiffs reasonably should have known of the planning commission's proposals. In fact, the trial court found that "there is no evidence of specific details formulated or legislation proposed . . . ." The uncommunicated intention of the planning commission is irrelevant to the issue of notice, and the trial court could not properly rely on this extrinsic evidence to support a finding of adequate notice. We therefore turn our attention to the express language contained in the building permit.

Plaintiffs argue that the language alerted them only to the possibility of a downtown-wide assessment district which applied to both new and existing office space, and the the transit fee imposed on a limited number of property owners is not at all similar to an assessment district. They argue that the language "peak demand generated by cumulative office development in the

downtown area" refers to total ridership, including all downtown office space. They further interpret the term "downtown assessment district or similar, fair and appropriate mechanism" as limiting the funding mechanisms to that which is applied on all downtown office buildings, not just on new office space. They also argue that the transit fee is not similar to the assessment district language since it singles out new buildings in a manner unlike any then existing assessment district. We agree.

The term assessment district connotes a limited geographic area in which property therein is taxed to pay for benefits of strictly local interest. (See *City Council* v. *South, supra,* 146 Cal.App.3d at p. 327.) The transit fee imposed is limited only to certain buildings within the designated "downtown area." Since the entire downtown area is affected by the peak demand in ridership, it would be unreasonable to expect plaintiffs to anticipate that only a few office buildings would be covered by the funding mechanism. We do not think that the words "similar, fair and appropriate mechanism" reasonably could be construed to include the exclusive funding mechanism of the type in effect here. When a vested right is implicated, due process requires that notice be meaningful or "of such nature as reasonably to convey the required information . . . ." (*Mullane* v. *Central Hanover Tr. Co., supra,* 339 U.S. at p. 314 [94 L.Ed. at p. 873].)

Relying on *La Canada Flintridge Development Corp.* v. *Department of Transportation* (1985) 166 Cal.App.3d 206 [212 Cal.Rptr. 334], the city argues that it was not under any obligation to give plaintiffs notice. That reliance is misplaced. There, the reviewing court held that the Department of Transportation was not estopped from requiring the developer to pay for widening the highway after the local city council had approved the subdivision map. The court found that the state agency could impose this condition without first raising concerns about state highways with local agencies when those highways are merely adjacent to proposed new developments. (*Id.,* at pp. 219-220.) That case resolved a jurisdictional dispute between two government agencies and is inapposite to the matter before us. We conclude that the language in the building permits and the extrinsic evidence offered by the city did not reasonably place plaintiffs on notice to

expect this development fee, and the retroactive application of the Ordinance is unconstitutional.

Nor do we believe that the environmental impact report gave plaintiffs adequate notice of imposition of the development fee. In the comments to the plaintiffs' draft environmental impact report, plaintiffs recognized the need for expanded transit services that their development would generate. Also, plaintiffs agreed to "contribute to funds for maintaining and augmenting transit service, in an amount proportionate to the demand created by this project, *through a funding mechanism, such as a special assessment district, if such a mechanism is developed by the City.*" The italicized language demonstrates that plaintiffs were aware the city might establish an assessment district and would contribute their fair share to defray the increased transit costs. However, we cannot infer from this discussion that they could have reasonably anticipated the type of development fee enacted by the city. The environmental impact report gave plaintiffs no more information than the language in the building permits, which we have concluded was too general to support this type of exaction.

VI

Lastly, Russ Building plaintiff attacks the amount of the transit fee, contending that the methodology used and the assumptions relied upon by the city's consultants were unsupported by the evidence. The board fixed the transit fee at $5 per square foot. This was based on a June 1981 estimate of increased transit costs calculated by Bruce Bernhard of the San Francisco Public Utilities Commission Bureau of Finance. This fee was less than Bernhard's calculation of $6.57 per square foot. Prior to trial, the city retained Touche-Ross as a consultant. Touche-Ross calculated the increase in the transit costs to be $8.36 per square foot. This figure was based on a projected use over the next 45 years. The trial court found that the 45-year forecast was reasonable as it "rationally and directly related" to the estimated life of the buildings. The trial court also concluded that the assumptions and figures employed by the consultants in arriving at this amount were rationally based.

During the 10-week trial, each side presented exhibits and experts to testify about the methodology employed in calculating the transit fee. It is sufficient to state that the parties' experts differed in their approach. Whether the approach taken by the city's consultants was economically justifiable and financially and scientifically sound was a question of fact for the trial court, whose conclusion must be upheld if supported by substantial evidence. (See generally, *United Business Com.* v. *City of San Diego* (1979) 91 Cal.App.3d 156, 182 [154 Cal.Rptr. 263].)

A

Plaintiff challenges the use of the 45-year projection, claiming that it was not possible to estimate the increased transit costs that far into the future. Plaintiff relies on the testimony of its experts who stated, essentially, that for such a long period of time there were too many variables to consider to make any reliable estimate. Naturally, this conclusion was disputed by the city's experts. While the degree of precision of the costs decreases proportionally with the length of the projection, we cannot state that such long term forecasts are inherently unreliable or are so arbitrary as to be mere speculation. The trial court's decision approving the 45-year term was supported by substantial evidence.

B

Next, Russ Building plaintiff argues that Touche-Ross used an improper discount rate in calculating the present transit fee. Touche-Ross applied a discount rate of 1.74 percent in arriving at the net present value of the lump sum fee levied against plaintiff. Plaintiff contends that the discount rate was too low and that it should be based on the rate for the "snapshot year" 1980-1981, the period from which the ridership data was taken. Touche-Ross used an economic forecast which estimated the discount rate over the 45-year projected term, rather than the rate for the "snapshot year." This was the only long term projection in the record, and there was testimony on both sides concerning its accuracy. The

trial court found that there was a rational basis for using this method and we agree.

Plaintiff contends this figure is too low and that the discount rate for the snapshot year should have been used. We find no inconsistencies in the use of a snapshot year to predict the *amount* of increased services needed and the 45-year forecast to estimate the *cost* of those services over useful lives of the buildings. The increased usage of the transit system can be calculated to a reasonable certainty by selecting a model year, in this case 1980-1981, and extrapolating the need based on known quantities for ultimate office capacity, vehicle capacity, route structure and patronage volume.

In contrast to the future usage figure, the *cost* of those services is not reasonably ascertainable in any one year, but fluctuates with the economy. The cost for maintaining, repairing and purchasing new vehicles, and the costs of salaries and insurance, to name a few, are variable, subject to influences outside the control of city officials, e.g., gas prices, the inflation rate, etc. Under such circumstances, it would be unreasonable to base the discount rate on a "snapshot year" since it could be a year of unusually high or low inflation and, as we note, the inflation rate has not remained the same. In arriving at the cost of the increased transit services over the projected 45-year life of the building, it is more rational to use a forecast based on historical economic trends. We find substantial evidence to support the trial court's finding.

C

Relying on *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129 [130 Cal.Rptr. 465, 550 P.2d 1001], plaintiff also argues that the failure to include a rate adjustment mechanism is unconstitutional.[4] Plaintiff proposes the city collect an annual installment,

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[4] The Ordinance does provide that the fee should be reexamined annually to determine the amount to be levied against new buildings completed in subsequent years. (Ord. No. 224-81, § 38.6.) But this does not provide for reimbursement to owners who have already paid their share of the fee.

subject to yearly recalculations of the estimated cost. Plaintiff's reliance on *Birkenfeld* is misplaced. In that case, a City of Berkeley rent control ordinance required a rollback of all controlled rents to those in effect on August 15, 1971; this would become the maximum rent subject to adjustments on a unit-by-unit procedure, which the court held was too cumbersome to be effective. (*Id.*, at p. 136.) In this context, the court held that "[f]or such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions." (*Id.*, at p. 169.)

There is no similarity between the method for arriving at the maximum rent allowed in *Birkenfeld* and the projected costs for increased transit services in the instant matter. Unlike the Berkeley ordinance, the transit fee was not artificially limited to one particular year, but calculated based on the expected costs over the 45-year period, taking into consideration the fluctuating market conditions and inflation rate. A fair reading of *Birkenfeld* convinces us that an annual readjustment of the transit fee is not constitutionally mandated in this instance, and plaintiff's contention necessarily fails.

D

Next, plaintiff challenges the data used in the "snapshot year."

1

First, plaintiff argues the city erred in assuming that no federal or state grants for capital improvements for expansion of the transit system would be issued. The 1984 amendment to the Ordinance provides that "capital subsidies . . . shall be assumed only when and to the extent that receipt of such subsidies is reasonably probable." (Ord No. 224-84, § 38.5, subd. (b).) The trial court found that there exists "a debatable rational basis for concluding that State and Federal assistance for expansion vehicles and garage facilities will be unavailable . . . ."

In support of this finding, the trial court reasoned that since 1980 the city has had to use its own funds to finance all expansion vehicles. This evidence went uncontradicted. Also, the agency responsible for approving transportation grants to the region, the metropolitan transit commission, treats expansion as its lowest priority, behind maintaining "existing and committed" service. While plaintiff demonstrated the city's success with obtaining capital grants, there was insufficient evidence to show that the money received was used to expand upon existing facilities. On the basis of this record, we find sufficient evidence to support the trial court's conclusion that the board could not reasonably anticipate government funds for expanding the transit system over the next 45 years.

2

Section 38.3 of the Ordinance requires the owners of the new buildings to pay the "incremental financial burden" imposed on the Muni system, and that the fee should "measure the total incremental burdens" generated by new office development. The 1984 amendment to the Ordinance requires that costs and revenues for offpeak periods not be included in calculating the transit fee. (Ord. No. 224-84, § 38.5, subds. (e), (f).) Plaintiff argues that it is illogical not to include revenues collected from offpeak service in offsetting the total increased costs of services.

a

Plaintiff argues that the city erred in ignoring the revenues generated during offpeak periods. The argument goes that since the new office workers will surely use the Muni during offpeak hours, the revenue collected therefrom should be used to offset the cost of the increased transit services.

The evidence reveals that Muni provides offpeak service at a huge deficit. Touche-Ross, the city's consulting firm, used a marginal cost accounting approach and allocated the offpeak revenue to offpeak service, thereby reducing the deficit incurred during that period. There was no testimony that a surplus resulted from this accounting method. Thus, it does not appear that the

increase in revenue during offpeak hours has any financial impact on the cost of funding an expansion of the system to accommodate peak service use. The trial court found that this approach was rationally based and we agree.

b

Plaintiff also argues that the city deliberately understated the revenue to be generated by fast pass use during peak hours. In its statement of decision, the trial court found: Peak operating revenue is composed of fast pass revenue and cash fare. In order to determine the average revenue per peak period trip, it is necessary to estimate the proportion of trips which are paid by fast pass versus the cash fare. Touche-Ross calculated that 54 percent of all peak period trips made by downtown workers will be paid for by fast pass, and 46 percent will be in cash. The trial court concluded that the estimate for fast pass use was a reasonable one.

Plaintiff contends that Touche-Ross mixed its data bases to arrive at an artificially lower revenue estimate from fast pass use. Touche-Ross combined the high number of fast passes sold at a discount price during 1980-1981 with the high estimate of monthly fast pass trips derived from a 1979 study in which the fast pass was *not discounted.* This, plaintiff claims, unreasonably inflated the fast pass/cash ratio and yielded underestimated revenue. We agree. In order to estimate the revenue likely to be generated by fast pass use, the calculation should be based on the cost per ride paid for at the time the ride is taken. If the Muni maintained a constant pricing policy, it would not matter which year would be used to derive the sales figures. But since the pricing of fast passes fluctuates, it is inconsistent to compare the last year's cost of riding Muni with this year's ridership. Plaintiff is correct in concluding that use of different periods artificially underestimates fare revenue derived from fast pass sales. The sales figures and the ridership use should come from the same target year.

Next, plaintiff challenges the application of a "transfer rate" as part of the increased costs. Touche-Ross calculated a transfer rate to account for the times a rider is likely to transfer to another line in getting to his downtown destination during the peak period. The transfer rate was calculated to be 1.39, which meant that for every 100 trips to or from downtown, there would be 139 actual rides on the various Muni lines. The city's policy, codified in Ordinance No. 224-81 section 38.3, provided that there be no increase in the level of crowding resulting from the new office space. The trial court did not question the "legislative wisdom" behind this policy and looked only to the reasonableness of Touche-Ross's calculations. The court found the calculations to be reasonable. Plaintiff claims that the transfer rate arrived at is unjustified since the "crosstown" and "feeder routes" are not operating at or beyond capacity. We agree.

Touche-Ross calculated the transit fee so that the average "load factors"—a measure of the degree of crowding—does not rise due to construction of the new office buildings. The trial court found that even though the connecting routes were not operating at capacity, it was reasonable for the city to maintain the average load factors during peak periods because (1) it could reasonably be expected that surplus space would disappear over the 45-year life of the project and (2) excess passenger capacity can be reasonably viewed as an asset to be preserved.

While it may be ideal transit policy to preserve the present load factors in the connecting routes, it is unfair to require plaintiff to bear this burden alone. While the population generated by plaintiff's buildings will likely increase the ridership on the "feeder" and "crosstown" routes, there is no evidence of increased cost to Muni to operate these lines. This is the only relevant consideration, since the fee imposed by the city must not be more than needed to provide the improvements and services required by the development. (See *Trent Meredith, Inc.* v. *City of Oxnard, supra*, 114 Cal.App.3d at p. 325.) Anything beyond that would be unrelated to the development and constitute a tax. The trial court should have examined the city's policy against the applicable constitutional standards. Had it done so, it would have concluded

that only necessary expansion costs could be assessed against plaintiff.

4

However, we find these errors to be harmless. (See *Warner Constr. Corp.* v. *City of Los Angeles* (1970) 2 Cal.3d 285, 301 [85 Cal.Rptr. 444, 466 P.2d 996].) The difference between the transit fee as originally estimated and the amount using the methodology discussed above would result in an estimated fee well above the $5 figure imposed on plaintiff. Using the Touche-Ross analysis relied on by the trial court, a recalculation of the fast pass revenue figure would result in a $6-per-square-foot reduction, from $8.36 to $7.76. (See fn. 2, *ante*.) If the transfer rate were recalculated to exclude below capacity "policy lines," the fee would be further reduced by 81 cents per square foot; from $7.76 to $6.95; still well above the $5-per-square-foot fee imposed by the city. Accordingly, it would serve no purpose to remand this matter for further findings.

VII

In summary, we hold that the transit fee was a lawful development fee which is not governed by California Constitution articles XIII A or XIII B, and it does not interfere with plaintiffs' due process and equal protection rights. The fee is not a double tax and does not violate section 3.598 of the city's charter. Any error in calculating the fee was harmless, and the judgment in favor of the city and against Russ Building plaintiff is affirmed.

However, we conclude that the retroactive application of the transit fee to Crocker plaintiffs was unconstitutional and the judgment shall be reversed as to them. Each party to bear its own costs on appeal.

Haning, J., concurred.

KING, J., Concurring and Dissenting.—I agree with the majority that the San Francisco Transit Impact Development Fee Ordinance is valid as imposing a development fee. However, I dissent from section V, in which the majority finds the evidence does not support the trial court's findings that (1) language conditioning the issuance of the permit upon participation in a transit funding mechanism put the Crocker plaintiffs on notice that they might have to contribute for future transit service, and (2) the fee

imposed by this ordinance could reasonably have been anticipated from that language. By this finding my colleagues incorrectly preempt the fact finding function of the trial court.

I also agree with the majority, as did the trial court, that the Crocker plaintiffs acquired a vested interest to complete construction and to use their building in accordance with the terms of their permits. But there is nothing inequitable about requiring them to pay a fee to provide revenue to offset the increased costs generated by new transit riders, since it was a condition of their building premit.

The application of this fee to the Crocker plaintiffs would not violate vested rights acquired under a prior building permit. As the majority opinion points out, in comments to the Crocker plaintiffs' draft environmental impact report they themselves recognized the need for expanded transit services that their development would generate. They agreed to "contribute funds for maintaining and augmenting transit service, in an amount proportionate to the demand created by this project through a funding mechanism, such as a special assessment district, if such a mechanism is developed by the City." The planning commission's issuance of the building permit was conditioned upon participation in such a funding mechanism, as specifically suggested by the Crocker plaintiffs. I agree with the trial court that Crocker's own offer to contribute to a funding mechanism, the language in the building permits, and the extrinsic evidence offered by the city reasonably placed the Crocker plaintiffs on notice to expect this development fee, so that its application is not truly retroactive at all.

The transit fee imposed by the Ordinance, as found by the trial court, is well within the range of possible funding mechanisms which the Crocker plaintiffs could have expected based upon the condition in their building permit. Without this condition, the building permit would not have been issued. Having obtained their building permit according to the rules, the Crocker plaintiffs now refused to play by those rules. As a result, the Crocker plaintiffs now have their cake and can eat it too—and the majority opinion supplies the frosting.

Appendix B

No. 1/5 AO30997, AO33493/SOOO156

In the Supreme Court of the State of California
IN BANK

Russ Building Partnership, Appellant

v.

City and County of San Francisco, Respondent
(and Companion Cases)

[Filed June 3, 1987]

The order granting review is hereby modified: Petition for review by Russ Building Partnership DENIED. Petition for review by the City and County of San Francisco GRANTED.

Pursuant to rule 29.2 (b) of the California Rules of Court, review is limited to and briefs on the merits are to be confined to the following issues, discussed in Part V of the opinion of the Court of Appeal: (1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued.

Review shall not extend to the issues raised in the answers to the petitions for review.

LUCAS
Chief Justice

MOSK
Associate Justice

PANELLI
Associate Justice

ARGUELLES
Associate Justice

EAGLESON
Associate Justice

KAUFMAN
Associate Justice

Appendix C

Order Granting Review
After Judgment by the Court of Appeal
First District, Division Five,
No. AO30997, AO33493/SOOO156
In the Supreme Court of the State of California
IN BANK

Russ Building Partnership, Appellant
v.
City and County of San Francisco, Respondent

Pacific Gateway Associates, Joint Venture, Appellant
v.
City and County of San Francisco, Respondent

Crocker National Bank et al., Appellants
v.
City and County of San Francisco, Respondent

[Filed April 30, 1987]

Petitions for review GRANTED.

Pursuant to rule 29.2(b) of the California Rules of Court, review is limited to and briefs on the merits are to be confined to the following issues, discussed in Part V of the opinion of the Court of Appeal: (1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued.

Review shall not extend to the issues raised in the answers to the petitions for review.

Chief Justice

Mosk
Associate Justice

Brennan
Associate Justice

Arguelles
Associate Justice

Kaufman
Associate Justice

Appendix D

California Superior Court
City and County of San Francisco
Department Number Eleven

No. 780 795

Russ Building Partnership, a California general partnership, consisting of The Shorenstein Investment Company, The Swig Investment Company, and The Weiler-Arnow Investment Company, as partners, on behalf of itself and all other owners and developers of property within the Downtown Area defined in Ordinance No. 224-81 of the City and County of San Francisco similarly situated,

Plaintiffs,

vs.

The City and County of San Francisco, a municipal corporation,
Defendant.

Pacific Gateway Associates Joint Venture,
a general partnership,
Plaintiff,

vs.

The City and County of San Francisco, a municipal corporation,
Defendant.

Crocker National Bank, a national banking association, and Crocker Properties, Inc., a corporation,
Plaintiffs,

vs.

The City and County of San Francisco, a municipal corporation,
Defendant.

STATEMENT OF DECISION

[Filed January 4, 1985]

INTRODUCTION

The Transit Impact Development Fee ("TIDF") Ordinance was enacted on May 5, 1981 and became effective on June 5, 1981.

The purpose of the Ordinance is to require developers of new office buildings in a defined district in downtown San Francisco, "to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway ("Muni") in serving the new riders generated by those new buildings over the life of those buildings (TIDF Section 38.3). The fee is to be collected by the City at the time a Certificate of Final Completion and Occupancy is issued for the building (TIDF Section 38.4). The initial fee was set at $5.00 per square foot (TIDF Section 38.5), and has not been changed.

The fee is to be measured by the incremental cost of providing the additional service over 45 years, the assumed life of a building (Ex. 631, p.3; Ex. 54, p.5).

There is no provision in the Ordinance for adjustment of the fee once the developer becomes obligated to pay. The Ordinance provides that the fee is to be re-calculated once a year (TIDF Section 38.6), but the re-calculated amount only applies to new buildings which receive their Certificates after the fee has been re-calculated. On May 28, 1981, Plaintiff, RUSS BUILDING PARTNERSHIP, representing a class of over 6,000 property owners, within the TIDF district, commenced this action to have the TIDF Ordinance declared illegal on its face and as applied on the grounds that: (a) it is an unlawful special tax under Proposition 13 (Cal. Const. Art. XIII A); (b) it makes illegal appropriations within the prohibition (Cal. Const. Art. XIII B); (c) it violates due process and equal protection clauses of the United States and California Constitutions; and (d) it violates Section 3.598 of the City Charter.

An action by Plaintiffs, PACIFIC GATEWAY ASSOCIATES JOINT VENTURE ("PACIFIC GATEWAY"), and CROCKER NATIONAL BANK, and CROCKER PROPERTIES, INC. (jointly referred to as "CROCKER"), against the CITY AND COUNTY OF SAN FRANCISCO (S.F. Superior

Court Nos. 789365 and 790661) were consolidated for trial with this action as to all issues except certain vested rights claims asserted in those actions.

An action by MAIDEN LANE ASSOCIATES was commenced against the CITY AND COUNTY OF SAN FRANCISCO (S.F. Superior Court No. 780795). It was consolidated for trial with the class action and the PACIFIC GATEWAY-CROCKER case, and by stipulation entitled "Order Severing Certain Complaint in Intervention Causes of Action" filed May 2, 1984, MAIDEN LANE ASSOCIATES' Second, Third, Fourth, Sixth and Seventh Causes of Action shall be bound by the final determination of the issues in consolidated actions, RUSS BUILDING PARTNERSHIP, et al. vs. THE CITY AND COUNTY OF SAN FRANCISCO, No. 780795, PACIFIC GATEWAY ASSOCIATES JOINT VENTURE vs. THE CITY AND COUNTY OF SAN FRANCISCO, No. 789365, and CROCKER NATIONAL BANK, et al. vs. THE CITY AND COUNTY OF SAN FRANCISCO, No. 790661.

Pursuant to stipulation entitled "Stipulation Re Complaint in Intervention" filed May 1, 1984, MAIDEN LANE ASSOCIATES' Eighth and Ninth Causes of Action were severed and pursuant thereto, this Court specifically reserves the jurisdiction over the final disposition of the Eighth and Ninth Causes of Action pending administrative determinations regarding retail conversion credits.

The RUSS BUILDING Plaintiffs are a class consisting of all owners of property in that part of downtown San Francisco included in the Transit Impact Development Fee District ("TIDF Ordinance"), Section 38.1, subsection (d). Plaintiffs, "PACIFIC GATEWAY" and "CROCKER" have built new office buildings within the Transit Fee District and have opted out of the class.

On May 5, 1981, the Board of Supervisors of the City and County of San Francisco enacted the Transit Impact Development Fee Ordinance; Ordinance 224-81 (codified as S.F. Admin. Code Section 38.1-38.18 (Intervenor's Ex. 12)).

On May 15, 1984, the Board of Supervisors amended the TIDF Ordinance; Ordinance 224-84 (Ex. 587). The amendments did not change the findings of the TIDF except with respect to retail and other uses. (1984 Amendment, Section 38.5).

The 1984 Amendment added certain "principles" under which the cost of the fee is designed to reflect are to be calculated (Sections 38.5 (a) through (g)). Those "principles", in effect, adopted the methodology of Touche-Ross, an accounting consulting firm hired after the commencement of this litigation by the CITY. (RT 4226-4231, 4231, 4271-72 (Firestone)).

FEDERAL AND STATE CONSTITUTIONS AND STATUTES

"The Police Power is the inherent reserve power of the State to subject individual rights to reasonable regulations for the general welfare (citation). One of the most common subjects of local Police Power regulations—is the area of land use and development (citation)." *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 C.A.3d 317, 325.

It has long been settled that the Police Power extends to objectives in furtherance of the public peace, safety, morale, health and welfare and is not a circumscribed prerogative but is elastic and, in keeping with the growth of knowledge and the belief in the populations' mind of the need for its application, capable of expansion to meet existing conditions of modern life. *Birkenfeld v. City of Berkeley* (1976) 17 C.A.3d 116, 129.

One of the most common subjects of local Police Power regulations is in the area of land use development. *Condit v. Solvang Mun. Improvement District* (1983) 146 C.A.3d 997. Whether there has been a reasonable exercise of the Police Power is a question for the Court. *Liberty v. California Coastal Commission* (1980) 113 C.A.3d 491, 502. Where ordinances or bylaws have been enacted pursuant to competent authority, they will be supported by every reasonable intendment and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold ordinances and bylaws unless they manifestly transcend the powers of the enacting body. *Galligan v. City of San Bruno*

(1982) 132 C.A.3d 869, 874. Unless the challenged provisions are palpably unreasonable, arbitrary, or capricious, they will be upheld as a valid exercise of the Police Power. *Brex* v. *City of San Rafael* (1979) 92 C.A.3d 47, 50. An ordinance will be upheld under the Police Power unless there is a complete absence of even a debatable rational basis for the legislative determination. *Birkenfeld, supra*, p. 161. "The Courts have nothing to do with the wisdom or expediency of measures adopted . . . and will not substitute their judgment or notions of expediency, reasonability, or wisdom . . .". *Carlton Santee Corp.* v. *Padre Dam Mun. Water District* (1981) 120 C.A.3d 14, 28.

At the outset, this Court must determine whether the TIDF is a regulatory fee or a development fee. Where an assessment is classified as a regulatory fee, the Court must make a factual determination as to whether or not such fees were greater than the reasonable cost of the regulatory activity for which they were imposed. *Mills* v. *County of Trinity* (1980) 108 C.A.3d 656. The significance of this cost-benefit analysis is this: if revenues collected exceed the cost of regulatory fee, the fee may be a "special tax" under the California Constitution, Article XIIIA, Section 4. *County of Fresno* v. *Malmstrom* (1979) 94 C.A.3d 974. If the fee extracted is a "special tax", that extraction must be submitted for voters approval and requires a two thirds vote of the electorate. *Government Code Section 50077.* Where a fee is classified as a development fee, the assessment must reasonably relate to the protection of the public health, safety and general welfare. *Ayres* v. *City of Council* (1949) 34 C.A.2d 31. In short, the assessed fees must be related to the increased disbursements required of the governmental body to provide improvements and service resulting from the new development. *Trent Meredith, Inc., supra.*

No case has ever explicitly attempted to define either a development fee or a regulatory fee, *County of Fresno* v. *Malmstrom, supra*, nor will this Court attempt to do so. The TIDF is a development fee that requires the payment of money as a condition for the approval of new office construction to offset burdens placed on public transportation by that new construction. For other examples of development fees, see *Trent Meredith, Inc.* v. *City of Oxnard, supra; Associated Home Builders* v. *City of*

Walnut Creek (1971) 4 C.A.3d 63; *McLain Western No. 1* v. *County of San Diego* (1983) 146 C.A.3d 772; *Kaloydjian* v. *City of Los Angeles* (1983) 149 C.A.3d 690; *City Council* v. *South* (1983) 146 C.A.3d 320; *Norsco Enterprises* v. *City of Fremont* (1976) 54 C.A.3d 488.

California courts have long upheld the validity of ordinances which require developers to mitigate the effects of development on municipal services. The seminal case is *Ayres* v. *City Council* (1949) 34 C.2d 31. In *Ayres*, Los Angeles approved Plaintiffs subdivision application, but conditioned its approval on the dedication of a segment of the land to public use. The Court held that the conditions imposed were "reasonably related to the protection of the public health, safety and general welfare" and were therefore a valid exercise of the police power. *Ayres, supra*, at 38. In *Scrutton* v. *County of Sacramento* (1969) 275 C.A.2d 412, the Court upheld an ordinance empowering the imposition of exactions on developers. The Court relied on *Ayres* for the proposition that conditions imposed on development "reasonably conceived to fulfill public needs emanating from the landowner's proposed use" were constitutional where the conditions were designed to protect against deleterious effects of the development or to meet public service demands generated by the development. *Scrutton, supra*, at 421. Following this line of reasoning, the exaction of fees as a condition to development has been upheld in a variety of situations: In *Associated Home Builders, Etc., Inc.* v. *City of Walnut Creek* (1971) 4 C.3d 633, the Court upheld a requirement of dedication of land for park or recreational purposes of payment as an in lieu fee as a condition of subdivision map approval. In *Norsco Enterprises* v. *City of Fremont* (1975) 54 C.A.3d 488, a substantial fee for park and recreational purposes as a condition for condominium conversion was upheld. In *Builders Association of Santa Clara* v. *Superior Court* (1974) 13 C.3d 225 and *Trent Meredith, Inc.* v. *City of Oxnard* (1981) 14 C.A.3d 317, an ordinance requiring the payment of a fee or the dedication of land for additional school construction as a condition for approval of development was upheld. In *McLain Western #1* v. *County of San Diego* (1983) 146 C.A.3d 772, the Court upheld an ordinance requiring that the developer pay substantial fees to offset the burdens placed on the school system as a result of new

development. In *Kalaydjian* v. *City of Los Angeles* (1983) 149 C.A.3d 690, the Court upheld an ordinance which imposed a fee on developers who convert apartments to condominiums to pay for the cost of relocating tenants displaced by the conversion.

Courts have upheld a variety of ordinances which condition the right to develop upon the developer in some way mitigating the burden created by the development. Judicial concern is directed to questions of whether the ordinance is reasonably related to a legitimate governmental objective.

The legitimacy of a governmental objective is limited only by the scope of the police power authorized by Article XI, Section 7 of the California Consititution; that is, the objective must be "reasonably related to promoting the public health, safety, comfort and welfare." *Sunset Amusement Co.* v. *Board of Police Commissioners* (1972) F.C.3d 64, 72. Development and maintenance of an adequate public transportation system has been found to be an important objective reasonably related to the general welfare by the California Legislature. *Gov't Code Sections 14000, 14000.5.* In these code sections, the Legislature addressed this issue and found that there is a need for improved transportation systems to meet increasing demand and that a goal of the State is to provide adequate, safe and efficient public transportation facilities. See also *San Franciscans for Reasonable Growth* v. *City and County of San Francisco* (1984) 151 C.A.3d 61.

Since the objective of providing adequate public transportation is a legitimate governmental objective, this Court must determine whether there is a sufficient nexus between the stated objective and the extraction of TIDF fee. The TIDF specifically states that the funds may not be used except to meet the increased demand for peak-period transit facilities created by new office development. (TIDF Section 38.7). Since the need for additional public transportation has been shown by the evidence to be directly related to the construction of new offices, there is a sufficient nexus. Indeed, authorities discussed above have not required the degree of specificity provided by the TIDF. No infirmity arises merely because the general public would share the benefit of the contributed resources or because the exaction creates facilities which will not directly benefit the development. *Associated Home*

Builders, Etc., Inc. v. *City of Walnut Creek* (1971) 4 C.3d 633, 640.

The resources need only be used to combat the general problem created by new development. *Liberty* v. *California Coastal Commission* (1980) 113 C.A.3d 491. Moreover, the relationship between the harm sought to be corrected or prevented by the condition and the development on which the condition is imposed need not be direct or subject to precise measurement. *McLain Western #1* v. *County of San Diego* (1983) 146 C.A.3d 772, 778. In *McLain, supra*, for instance, the Court held that it was irrelevant to the validity of a fee for interim school facilities caused by new development that a particular development would generate little demand for schools since it is not unreasonable to consider the growth of the area, present and future, in determining the need for schools caused by land development. In *Associated Home Builders, supra*, the Court found a sufficient nexus in that new subdivisions, in general, use up remaining open space and bring in new residents, creating more demand for parks.

This Court concludes that if the extraction of the TIDF is *both* rationally based and reasonably related to the permissible legislative objective of mitigating the effects of the need for more public transportation generated by new downtown office development, the constitutionality of the Ordinance must be upheld.

This Court's conclusion also disposes of Plaintiffs' taking clause challenge to the TIDF. There is no deprivation of property without just compensation within the meaning of the federal or state constitutions so long as the development fee is reasonably related to a legitimate governmental objective and addresses a need created at least in part by the new development. *Associated Home Builders, supra*, 4 Cal.3d at 637-640 & nn. 5 & 6.

EFFECT OF THE 1984 AMENDMENT TO THE ORDINANCE

The Court finds that the 1984 Amendment was a clarification by the Board of the methodology used and to be used in calculating marginal costs for each gross square foot of new office construction in the downtown area. The Amendment does not

effect the substantive rights of the parties nor does it effect the amount of the fee to be extracted. Section 38.3 of the Ordinance has not been amended and provides: "It is the purpose of this Ordinance to require developers of new development in the downtown area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway for both initial capital outlay for the acquisition of rolling stock and the construction of facilities and for the long-term operation, maintenance and replacement of those facilities once they are in place .... The rate making provision established by this Ordinance is intended to identify and measure the total incremental burden imposed on the City's Municipal Railway by virtue of the demands created by office use .... This fee will enable the City to pay the capital and operating costs of all additional peak period public transit service in the downtown area necessitated by office use in new development".

As a general rule, a Court must apply the law in effect at the time it makes its decision. *Gregory v. City of San Juan Capistrano* (1983) 142 C.A.3d 72, 78. The effect of an amendment to a law is to render the pre-existing law inapplicable. *Selby Realty Co. v. City of San Buena Ventura* (1973) 10 C.A.3d 110, 125. In *Gregory*, the Plaintiffs challenged the constitutionality of the Mobile Home Rent Control Ordinance. The Defendant City amended the Ordinance several times during the trial and once after the trial while the appeal was pending. The Court of Appeal held that the Ordinance, as amended, was the one to be reviewed. Absent clear legislative direction, the burden of interpreting unclear statutory language falls on the judiciary. *Birkenfeld v. City of Berkeley* (1976) 17 C.A.3d 129. However, it is preferable for the legislative branch to declare clearly and unequivocally what it meant so that the Court can make a determination on the issues. *Rodriquez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626. As in *Gregory, supra*, the Court must focus on the Ordinance as amended in 1984 and make a determination on the constitutional issues.

The language of the amended Ordinance is entirely consistent with the original Ordinance. It clarifies language which may have been ambiguous and it addresses certain elements of detail as to

which the original Ordinance was silent. It, in no respect, alters any of the principles or basis underlying the transit fee nor does it direct specific calculations inconsistent with those principles and purposes.

ANALYSIS

As indicated above, Touche-Ross was retained by the CITY and rendered a study to the General Manager of the Public Utilities Commission charged with implementing and enforcing the legislation pursuant to Sections 38.6 and 38.9 of the Ordinance. The study was in turn presented to the Board of Supervisors as required by Section 38.6 of the Ordinance. (See Ex. 508-509). Following that submission, the Board passed resolution #880-83, approving the Touche-Ross study. (See Ex. 53; Court Ex. 1). The Board again approved the Touche-Ross study as revised February 22, 1984. (Ex. 54; 1984 Amendment Section 4). It further accepted as reasonable the corrected $6.57 Bruce Bernhard computation. (See Ex. 39).

In order to determine whether the Touche-Ross methodology adopted by the Board was consistent with the purposes and intent of the Ordinance *and* is rationally based, the Court will discuss separately each of the so-called "principles" encompassed within Section 38.5 (a) through (g).

a) (*Determination of peak period*): Plaintiffs do not contest the principles stated in this subsection other than to contend that this subsection and all following subsections contained in Section 38.5 adopted the Touche-Ross methodology. Defendant contends that the Board could rationally conclude that the Muni operated at vehicle capacity during the entire peak period, as defined by Touche-Ross and that additional vehicles would be needed to add runs to meet new demand generated by new downtown office space. The Court finds that with the exception of policy driven cross-town lines,[1] there is a rational basis for such a finding.

Touche-Ross defined the peak period as follows:

Motor Coach	Trolley Coach	LRV
AM 6:50—9:10	7:20—9:10	6:30—9:30
PM 4:00—6:10	3:50—6:10	3:50—7:10

Muni used the same definition used by Touche-Ross as Muni's official definition of peak period for purposes of its reporting to the Urban Mass Transportation Administration (UMTA). UMTA requires periodic reporting of transit operations data by Federal grantees; included among the required data is information specific to the peak period. Each operator must under general Federal standards determine its own peak period. (RT 13-19 (Firestone)). Muni and UMTA mutually agreed upon hours which met that description for Muni. (RT 1440-1442 (Firestone)). Touche-Ross found these hours suitable for its use. (RT 17-18 (Firestone)).

The Court concludes that Muni operated at vehicle capacity in 1980-1981 because there was a rational basis for finding that during the peak period, Muni's entire fleet was either (a) in operation; (b) undergoing service; (c) held back for reserves; or (d) awaiting deployment later in the peak period. (RT 1675-82, 4174-84, 4217 (Firestone); RT 1941-42 (Hudak)).

The Board could rationally conclude that the peak period should not be shortened even though there is passenger capacity in the "shoulder" of the peak because it is neither feasible nor desirable to have a Muni line operating at passenger capacity except in the "peak of the peak". To do so would tend to concentrate travel in the peak of the peak to an even greater degree and would slow down Muni schedules even further, thereby requiring additional Muni trips. (RT 4403-4406-11, 4413-19 (Geissenheimer)).

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[1] The Court concludes that there was no rational basis for inclusion of policy driven cross-town lines. The effect of this exception will be discussed, infra.

Accordingly, the Court concludes that subsection (a) is rationally based and consistent with the intent and purpose of the Ordinance.

b) (*Calculation of subsidies only when receipt is reasonably probable*):

The Bernhard and Touche-Ross studies assumed that Muni would not receive any Federal or State capital grants for providing incremental service to downtown office workers in 1981 and for the following 45 years (Ex. 561, p. 2; Ex. 54, p. 5).

Plaintiffs contend that the assumption that Muni would receive no capital subventions for 45 years was irrational and unreasonable and such an assumption was and has been incorrect before, during and after the enactment of TIDF. (RT. 3095-96 (Dineen)). They argue that the Federal Government has been funding transportation systems since the early 1960's and capital funding was always a part of the program. (RT 2208-09 (Cherwony)). They contend that the City itself recognizes that Muni's capital projects over the past 20 years have been 80% funded by Federal funds and 20% by "local" funds—predominantely State money. (Ex. 8, p. 12). They further contend that it was irrational for Bernhard and Touche-Ross not to include in the 1980-81 snapshot capital grants already received or reasonably committed. (R.T. 3095, 3109 (Dineen)). That on June 5, 1981, the very day that the TIDF Ordinance became effective, the City requested Federal funding for an additional 15 LRVs (Ex. 12); and subsequently, an additional 25 LRVs were funded through State grants. (R.T. 956 (Stoll)) And finally, that Federal capital costs are available to Muni for expansion, not just replacement. (Ex. 9, p. 115; Ex. 14B, p. J.25; R.T. 377 (Bernhard); R.T. 246 (Shao); Ex. 7-A, p. 204; Ex. 78, Ex. 9, p. 118).

It is clear that Muni has received funding for its various projects from outside sources. However, it is Plaintiffs' burden to show that no rational basis exists for concluding that no State and Federal capital subsidies will be available in the next 45 years to provide additional peak period service due to new downtown office workers. Plaintiffs' evidence is impressive. However, the Board of Supervisors could rationally conclude that governmental assis-

tance will not be available to fund expansion of service to meet the demands of new downtown office buildings. (Ex. 54 at 5; RT 3420 (Dineen); RT 2213 (Cherwony)). The Court is of the opinion that there exists a debatable rational basis for concluding that State and Federal assistance for expansion vehicles and garage facilities will be unavailable, in that: the Metropolitan Transit Commission ("MTC") is a regional planning agency which contracts all outside funding requested by transit operators in the Bay Area. (RT 1024-25 (Stoll); RT 2352 (Dahms)); MTC's highest priority is to fund "existing and committed" transit services—a specific level of services which was in place or planned as of July 1, 1979. (RT 1210-11 (Stoll); RT 1270 (Dahms)); that funding of vehicles and facilities necessary to expand service beyond the existing and committed service is MTC's lowest priority. (Ex. 562; Ex. B at p. 2; RT 1271 (Dahms); RT 999 (Stoll)); and MTC applies the same priority in considering application for funds which it would distribute directly as it does in considering applications which would be made to Federal or State agencies for funds. (RT 999, 1024-25 (Stoll); RT 2352 (Dahms)). Muni may not make an application to a State or Federal agency unless said application is approved by MTC. (RT 1024 (Stoll)). Since 1980, the City has had to use its own funds to finance all expansion vehicles—those vehicles not included in the "existing and committed" formula and has purchased some vehicles required to maintain existing levels of service. (Ex. 559, RT 2332-33, 2335, 2338-39 (Dahms); RT 977, 1039-46 (Stoll)). The Board could have concluded that even if MTC were to allocate to Muni all money for the vehicle purchases which appear on MTC's "out-year" priority lists—lists of grants planned but not yet approved through 1988, that money would be insufficient to even purchase the necessary replacement vehicles to sustain existing service with no money available to purchase expansion vehicles. (Ex. 533; RT 1055-57 (Stoll)). The Board could reasonably have concluded that MTC does not anticipate having Federal funds available for expansion of service in the Bay Area because Section 9 of the Surface Transportation Act (49 U.S.C Section 1607a), which is intended to be the source of routine vehicle expansion, will not stretch beyond the region's replacement needs. (RT 2311, 2366 (Dahms); RT 999,

1096 (Stoll)). There is evidence that it is MTC's planning assumption that over the next 15 years there will be insufficient Federal grants, even to sustain existing service, let alone subsidizing expansion. (RT 2363-64 (Dahms); RT 452 (Bernhard)).

The Court concludes Section 38.5(b) is consistent with the legislative purpose under Section 38.3 of the Ordinance and is rationally based. The TIDF is to be set at an "actuarially sound level to insure" sufficient proceeds. (TIDF Ordinance Section 38.5). Without a reasonable assurance that outside capital funding would be available, a fee that included an offset for such funding would not be "actuarially sound" and would not "insure" that the City would have the funds to purchase vehicles made necessary for new downtown office space.

c) (*No increase in the level of crowding*): Plaintiffs contend that Section 38.5(c) defines a cost to exist where there is no cost in effect. Further, that this subsection is inconsistent with the Ordinance's findings, purposes and intent. The foundation of this argument is that incremental passengers boarding buses that have sufficient capacity do not in fact add incremental or marginal costs. Plaintiffs further contend that the numbers that fall out of the Touche-Ross methodology adopted by the Board would in effect replicate the entire transit system over a period of years, which is irrational and contrary to the intent of the Ordinance. As previously noted, it is not the function of the Court to second-guess legislative wisdom. This Court's review begins and ends with a determination as to whether there exists a rational basis for the Touche-Ross methodology.

Muni's maximum "capacity" expressed in terms of an average load factor was 1.5 for its rubber-tired fleet and 2.0 for LRVs in 1980-81. (Ex. 517). The evidence discloses that these load factors translate into extremely crowded vehicles and that the level of crowding was tolerated in 1980-1981 only because Muni lacked resources to improve that condition. (Ex. 517; RT 1222, 1239-40 (Stoll)). Since 1980-1981, Muni has revised its standard downward for its rubber-tired fleet to an average load factor of 1.25 for the peak hour (i.e. the one hour during the peak period with the highest load factor) and 1.36 for the peak 15 minutes for trolley and motor coaches. The peak hour average load factor standard

for LRVs is 1.62. (1984-1989 5-year plan, p. 18, 61; Ex. 517; Ex. 10 at P. 60-62, 121). The Board could have concluded that lower load standards are desirable because, in part, it would increase passenger comfort, allow Muni to adhere to schedules, help ease traffic congestion by encouraging drivers to use public transportation and lessen wear and tear on vehicles. (Ex. 517; 515 at P. 5; 594; RT 4413-22 (Geissenheimer)). It is the expressed policy of the City and County of San Francisco and the Public Utilities Commission that construction of new office buildings should not result in increasing average load standards on Muni lines during the peak period. (TIDF Ordinance Section 38.5(c); Ex. 587; 1984-1989 5-year plan at 61, appendix c; RT 1463-64, 1467, 1526-27, 1804, 1830, 4185 (Firestone); RT 2053, 2064 (Stamm)). The Touche-Ross methodology is consistent with this policy because it provides Muni sufficient money to purchase vehicles to maintain (but not to reduce) existing average load factors. (RT 1696, 4520-22 (Firestone); RT 4400 (Geissenheimer); RT 2234 (Cherwony); Ex. 45 at 4). Muni's average load factors indicate that, under any standard, Muni is extremely crowded and that its lines that are scheduled for peak period demand, both radial and cross-town, with the exception of policy lines, are operating at or in excess of capacity, whether one considers the peak hour or the peak 15 minute period. (Exs. 576A-576F; 590; 591). The Board could have reasonably concluded that even if there were "excess capacity" on certain cross-town demand driven lines or in the shoulder of the peak period, that that capacity would disappear at some point over the course of 45 years as new downtown office space is developed. (RT 1945-46, 1948-50 (Hudak); RT 3401-02, 3405-06, 3425-27, 4716 (Dineen); RT 2236-41, 2254 (Cherwony)). The Board could have viewed excess passenger capacity as an asset in that no system in the United States, with the exception of New York City, utilizes a higher percentage of its peak period passenger capacity than does Muni. (RT 4704 (Dineen)). Charging incremental costs of providing additional peak period service for both radial and cross-town lines (with the exception of policy lines), to new downtown office development is rationally based. (Ex. 587; RT 1463-64, 1467, 1526-27, 1804, 1830, 4185 (Firestone); RT 2053, 2064 (Stamm)). The Court concludes that inclusion of

incremental costs for policy driven cross-town lines has no rational basis in that there was no evidence before the Board nor is there any evidence that said lines would be likely to reach capacity over the next 45 years. However, notwithstanding that fact, the Ordinance is not rendered unconstitutional either on its face or as applied. Legislative precision is not required. *McLain Western #1 v. County of San Diego* (1983) 146 C.A.3d 778. There still remains a reasonable relationship between the fee extracted and the lawful objectives of the Ordinance. Further, elimination of incremental costs of policy lines and the adjustment of transfer rates would reduce the City's square foot cost by only $.81, from $8.36 to $7.55. (RT 4810 (Firestone); see also RT 4238-39 (Firestone)). Maintaining or reducing the level of crowding is a permissible legislative interest in that, among other things, it would encourage greater utilization of public transportation by the public and affords greater safety.

d) (*Cost of electricity*): Plaintiffs contend that the P.G.&E. rate (the opportunity cost) is an opportunity of the City, not the Muni. They contend that this is not consistent with the Ordinance's purpose in calculating the total incremental burden on the Municipal Railway. That is, the Ordinance does not direct that the total incremental burden to the City be calculated, only Muni's. In enacting subsection (d), the Board adopted both the Touche-Ross and Bernhard methodology, and could rationally conclude that the opportunity cost reflects lost revenue which results when additional power is consumed by Muni and is therefore made unavailable for sale to customers at P.G.&E. rates. Accordingly, the Court concludes that it was consistent with the purpose and intent of the Ordinance and rationally based.

e) (*Exclusion of off-peak cost and revenue in calculating TIDF fee*): Plaintiffs contend that principles of marginal accounting required that such off-peak cost and revenue be included and that to ignore the existence of costs and revenues generated by the use of the Muni during off-peak hours is irrational. In essence, they contend that although a tax need not necessarily be reasonable, a fee must. Muni incurs substantial cost in providing off-peak service, which operates at a huge deficit. (Ex. 54). The Board could rationally conclude in order to carry out the purpose

and intent of the Ordinance, that it should allocate costs and revenue associated with off-peak trips to the off-peak period, thereby permitting Muni to recoup a portion of the loss incurred in providing that off-peak service. (RT 4135-36 (Firestone)). In performing a marginal cost accounting, it becomes necessary to define the scope of the subject accounting and the peak period is an appropriate boundary to draw. (RT 1437; 1738-40 (Firestone)). At best, the record discloses a conflict of evidence as to whether the marginal cost accounting in the Touche-Ross and Bernhard methodology is a preferable one. As such, this Court may not substitute its judgment for legislative wisdom. *Carlton Santee Corp. v. Podre Dam Muni. Water District, supra*, at p. 28. Accordingly, the Court finds that subsection e carries with it a debatable rational basis.

f) (*Peak period revenue assumed to increase at the same rate as peak period operating costs*): Plaintiffs do not seriously question this aspect of subsection (f). The primary objection relates to the fast pass/cash ratio revenue determination to be discussed, infra.

The Board could rationally conclude that Muni peak period operating revenues would rise in proportion to increases in operating costs. The percentage of operating costs which Muni has been able to recover from revenues (fare revenue recovery ratio) has fallen dramatically from approximately 90% in the mid-1950's to approximately 30% in the mid-1970's. (RT 1720 (Firestone); RT 3980 (Stamm)). In the mid-1970's, the fare revenue recovery ratio stabilized in the low 30% range after the passage of AB1107. (RT 3980 (Stamm); RT 1720 (Firestone); RT 1266 (Dahms)). AB1107 is a State funding program which makes operating assistance available to transit properties in the Bay Area so long as those properties recover 33% of their operating costs from fare box revenues. AB1107 funds are an important source of operating assistance for Muni and it is reasonable to assume Muni will not sacrifice that source, if possible. (RT 3980 (Stamm)). In 1980-1981, AB1107 provided more than 30% of Muni's operating assistance. Absent the artificial floor imposed by AB1107, Muni's fare revenue recovery ratio would have fallen even further. If anything, Muni's fare revenue recovery ratio is likely to decline in

the future. This is due to historical trend and the fact that in 1984, AB1107 was amended. Muni is now eligible for AB1107 funds even if 33% of operating expenses are not recovered through the fare box so long as the difference is made up out of other local revenues. (Public Utilities Code Section 29142.5. Ex. 582; RT 3982-83 (Stamm); RT 1717-18 (Firestone)). If the City, as it now may, allows fare box recovery ratio to fall even further, then Touche-Ross may well have over-estimated the amount of operating revenue, which will be collected in the future and correspondingly under-estimated the net cost of providing the service. (RT 1717-18 (Firestone)).

g) (*Fast pass/cash fare calculations*): Plaintiffs contend that Touche-Ross invalidly mixed data from different years in a manner which artificially inflated the percentage of trips taken by fast pass as well as the number of trips taken by the fast pass, which would result in under-stating revenues. They argue that Touche-Ross used the temporary discount fare structure of 1980-1981 to derive an artificially high number of fast passes sold and obtained the number of trips per fast pass from the convenience fare structure that had existed prior to 1980-1981; that these are the highest two numbers that the respective fare structures would create; that Touche-Ross then multiplied these two numbers together to calculate a fast pass to cash ratio of 53.68% fast pass and 46.32% cash.

The Court finds that the Board of Supervisors could rationally conclude on the basis of the Touch-Ross Study, (Ex. 54), that the present value of operating revenues for one incremental peak period trip per year for 45 years measured as of 1980-1981, was $7.23 because there is at least a debatable rational basis for each of the following:

1. Peak period operating revenue is made up of two components: fast pass revenue and cash fare. (Ex. 54 at p. 22). Although the actual 1980-1981 price of a fast pass and cash fare is known, in order to determine the average revenue per peak period trip, it is necessary to estimate the proportion of trips which are paid by a fast pass as opposed to cash fare. The calculation in the Touche-Ross Study, (Ex. 54, p. 19-20), demonstrates that approximately 54% of all peak period trips made by downtown workers will be

paid for by fast pass, 46% by cash fare. That estimation of fast pass usage is a reasonable one. (RT 1702, 1705-08 (Firestone)).

2. There is no more reliable estimate of the fast pass percentage. The 31% figure which Plaintiffs use does not reflect peak period commuting habits of downtown workers and is based on wholly different fare structures, which were in effect in 1980-1981. Reliance on that number would overstate revenue. (RT 1992-93 (Hudak)).

3. Confirmation of the Touche-Ross methodology may be found both in the fact that it is known that the fast pass percentage in 1980-1981 must have been a minimum of 50.3% for the entire day and would have been even higher during the peak period. (Ex. 570). Moreover, the only actual data available was recorded in 1984 which shows that 54% of all those boarding a LRV during the peak period between West Portal and Embarcadero Station used a fast pass as opposed to cash. (Ex. 577).

4. The most reliable estimate of the average number of total trips taken by each fast pass holder is 57 trips per four week period. That number derived from the Gruen, Gruen & Associates' survey yields an average revenue per fast pass trip of $.25.9. (Ex. 54 at p. 21).

5. Although fast pass usage will vary depending on the fare structure in effect at any given time, it cannot be concluded that the fare structure in effect in 1980-1981 was inappropriate. The purchaser of the fast pass in that year would "break even" by taking at least 32 rides. After the TIDF Ordinance was enacted, the fare structure was changed so that the break even point was 40 rides. However, it has recently been revised again so that the so-called "discount pass" with a break even point of 33 rides will be reinstated. (San Francisco Public Utilities Commission Resolution 84-0331 (1984) and Board of Supervisor's Resolution No. 706-84 (1984), which the Court judicially notices).

6. Use of a 31% fast pass figure seriously distorts the revenue calculation resulting in an unsupportable conclusion that virtually each off-peak trip in 1980-1981 must have been paid for by a fast pass. (Ex. 70 at p. 22; Ex. 519).

7. The Touche-Ross revenue calculation understates actual revenue by a significant amount because it assumes that every passenger will pay a fare. In fact, there is a significant amount of fare evasion experienced by Muni that has not been factored into the numbers that fall out of the Touche-Ross Study. (Ex. 538 at p. 108-17; RT 4231-32, 4235, 4242 (Firestone); RT 2008, 2010 (Hudak); RT 2181 (Cherwony)).

In addition to the so-called "principles" enumerated in Section 38.5 discussed above, the Touche-Ross methodology adopted by the Board assumes further:

1. That the transfer rate was correctly calculated from adequate data;

2. That the trip generation rate was correctly calculated;

3. That the trip generation rate and transfer rate calculations are reasonable estimates for the next 45 years;

4. There is a rational basis for the real interest rate forecast in the Touche-Ross report; and

5. There is a rational basis for making a 45-year projection identifying and measuring the total incremental burdens imposed on the City's Municipal Railway during the peak period by virtue of demands created by office use in new development in the downtown area.

Was the Touche-Ross transfer rate correctly calculated from adequate data?

The transfer rate was obtained from the Barton-Aschman report which in turn relied upon survey data obtained by Recht Hausrath. (See Barton-Aschman trip generation study, Ex. 54, p. 1-12). The Recht Hausrath survey was conducted for purposes of the downtown Environmental Impact Report ("EIR"). The survey contained more extensive and reliable information than is usually available. (RT 3770 (Gibson)). Touche-Ross and the Board could conclude, based upon the evidence before it, that the data was adequate in order to correctly calculate the transfer rate, that is, the number of transfers a rider would take from cross-

town lines, and in some cases from radial lines, to get to their downtown destination during peak period.

Was the trip generation rate correctly calculated?

Plaintiffs contend that an appropriate trip generation rate is .307. Touche-Ross found that the annual linked trips per square foot of office space was .64. Plaintiffs base their contention upon their reading of the 1983 guidelines published by the Department of City Planning for use in the EIR. (Ex. 581 at p. 14). The Court has reviewed the record and it notes that there is no expert testimony supporting the Plaintiffs' approach nor attacking the Barton-Aschman trip generation rate. The Board could conclude, based upon the evidence before it, that Barton-Aschman correctly calculated the trip generation rate on the basis of adequate data and that if the 1983 EIR guidelines were correctly used, that would produce a result almost identical to Barton-Aschman's trip generation rate. (Ex. 54, appendix d; RT 3738-43 (Follette)). Survey data from the South of Folsom area included in the downtown area was not used since in the judgment of Barton-Aschman that data was unrepresentative. (RT 2969 (Follette)). The evidence discloses that the C-3 District yields a substantially higher trip generation rate than does the South of Folsom area. There is no evidence in the record, however, that such would hold true for more than the short term and there is uncontradicted evidence that it would not. (RT 3012-15 (Follette)).

That the trip generation rate and transfer rate calculations are reasonable estimates for the next 45 years.

The $8.36 per square foot cost calculated by Touche-Ross (Ex. 54) assumes that the trip generation rate calculated by Barton-Aschman from the Recht Hausrath survey is a reasonable estimate of the trip generation rate, which will be in effect for the 45 years covered by the projections. (RT 2078 (Stamm)). That assumption was made on the basis of Barton-Aschman's expert advice that the trip generation rate would remain relatively stable over time. (RT 1309-10 (Firestone)). The downtown EIR (Ex. 14) made certain demographic projections. Barton-Aschman measured the fluctuations in the trip generation rate on the assumption that the downtown EIR demographic projections

were correct. They concluded that the linked trip generation rate would fluctuate up and down over time but would stay within the range of between .64 and .60 trips per square foot. (RT 3774, 3788, 3794 (Gibson); Ex. 584 at p. 7). Similarly, the ratio of unlinked to linked trips would decline slightly over time from 1.39 to 1.34 trips per square foot. (Ex. 589; RT 4282 (Gibson)). The Board reasonably could have concluded that such changes over time were insignificant. (RT 4245-47 (Firestone); Ex. 592).

Was there a rational basis for the real interest rate forecast in the Touche-Ross report?

Touche-Ross used a price series growth forecast by Professor Gibbons to inflate present costs to their future value and used the Treasurer's earnings rate forecast by Professor Gibbons to discount future costs to present value. (See RT 1147-48 (Cornell); RT 3853 (Gibbons)). The real rate of interest forecast by Professor Gibbons for the next 45 years was approximately 1.7%. (See RT 1110 (Cornell)). This represents the real rate of interest, that is, the amount which the City Treasurer can earn over and above inflation. Professor Gibbons' forecast on real interest rate was the only long-term projection in the record. Plaintiffs' expert, Professor Cornell, made no projection of the real rate for 45 years and did not testify as to any alternative projection for a shorter term. (RT 1143 (Cornell)). There was considerable evidence in the record questioning the accuracy of the 1.7% forecast which this Court will not detail. The Court concludes that there is a rational basis for the methodology used to forecast the real rate of interest and for the resulting 1.7% forecast relied upon by Touche-Ross and the Board.

Is there a rational basis for making a 45-year projection identifying and measuring the total incremental burdens imposed on the City's Municipal Railway during the peak period by virtue of the demands created by office uses in new development in the downtown area?

TIDF directs that a lump sum be calculated to cover costs which would be incurred by the Muni in providing peak period transit services to meet demands generated by construction of new downtown office space. (TIDF Ordinance Section 38.5). The

City has the power to approve or disapprove applications to build new office structures in the new downtown area. If the City wishes to permit development but not to bear increased transit costs, it must know that the fee mechanism will recover the costs that would be incurred over the lifetime of the building. It is not disputed that an office building will stand and will generate transit passengers for 45 years. Accordingly, the 45-year forecast is rationally and directly related to the purposes of the Ordinance. The real question remains as to whether such a forecast, given the many variables including inflationary trends, can be calculated or whether they simply involve playing with numbers and thus, is irrational. Professor Gibbons testified that long-term projections are frequently essential in a variety of contexts, including the purchase of capital equipment, evaluating long-term bonds, evaluating stocks, funding public and private pension funds and appraising the value of real estate. (RT 3809-12 (Gibbons)). Los Angeles has projected trip generation rates and mode splits 35 years into the future to determine requirements for stations and parking lots for its new billion dollar Metro Rail System. (RT 4343 (Gibson)). Those projections are also being used for calculating a development impact fee. *Id.* MTC has based its $3 billion dollar new Rail Start Program on projections concerning the outlook for Federal Government capital funding through the year 2000. (RT 2358-59 (Dahms); Ex. 15). The San Francisco City Planning Commission is preparing a comprehensive downtown plan based on detailed projections of demographic and transit characteristics of San Francisco through the year 2000. (Ex. 14). Muni itself has projected demands and vehicle needs 20 years into the future to develop the fleet rehabilitation and replacement plan. (Ex. 515; RT 1041 (Stoll)).

The legislative process also routinely incorporates long-term projections: In *J.W. Jones Cos. v. San Diego* (1984) 157 C.A.3d 745, a development fee was upheld against undeveloped property to pay for the costs of future public improvement directly or indirectly generated by development of said property. (See also *Associated Homebuilders, Inc. v. City of Walnut Creek, supra*, p. 637-640; *Norsco Enterprises v. City of Fremont, supra*). The City does not argue that a 45-year projection can be made with 100% confidence. It also follows that long-term projections are inher-

ently less reliable than short-term projections and the uncertainty increases the further out the projection goes. (See RT 3813, 3914 (Gibbons)). The fact remains, however, that one cannot compute a present value without such projections and that such projections are essential and routine in many contexts. The Court concludes that the problems posed by long-term forecasts are not so great that the forecast cannot be done. Plaintiffs argue, however, that if the transit fee is permissible at all, it must be in the form of an annual extraction, presumably based on a 45-year forecast with the fee being adjusted so as to recover the costs which would be incurred in that year. However, the Court's routinely enter judgments for lump sum amounts. *Niles v. City of San Rafael* (1974) 42 C.A.3d 320; *Rodriquez v. McDonnell Douglas Corp.* (1978) 87 C.A.3d 626, 625-62. In any event, there is no testimony in the record from which one could determine that an annual fee would in fact be less onerous to developers than a 45-year lump sum. Of course, if the lump sum is correctly calculated, it will come out exactly equal to the series of annual payments. (RT 3920 (Gibbons)). Assuming that the forecast is off with respect to a given year, there will be no way of knowing at the outset whether the lump sum was too high or too low. Thus, the City and developers are equally at risk of the fee being too low on the one hand or too high on the other. An annual fee would not eliminate the inherent uncertainties of long-term projections. It would only shift the burden of making that calculation and the risk of the calculation being too low from the City to the developer. A developer setting out to plan an office project in downtown San Francisco would know that it would be subject to a series of at least 45 annual extractions to support public transit. In making a cost effective analysis, the developer would have to make some judgment with respect to the total liability he would face as a result of those annual payments. This means that the developer would have to take on the burden of performing a projection for 45 years or more in order to determine the likely present value of future annual extractions. (RT 3920-21 (Gibbons)). There is in fact no alternative to making a 45-year projection if the City is to recover the cost which Muni will incur in providing additional transit services to the users of new downtown office space. The Court concludes that there is a debatable rational basis for making 45-year

projections. Further, there is no legal basis for requiring an annual rather than a lump sum extraction.

Touche-Ross calculated the cost per passenger trip and cost per square foot on the basis of data relating to the Municipal Railway Transit System as it actually existed in 1980-81. Touche-Ross then projected that data forward using inflation forecast and discounted the future cost to present value using real interest rate forecasts. This methodology came to be known during the trial as the "snap-shot" methodology because the forecast is based on obsevations of a specific base year. There is ample support in the record for the "snap-shot" methodology being the only reasonable methodology which could be employed to make long-term projections required here. It is the accepted methodology in setting rates for regulated utilities and has been implemented by the California Legislature and upheld by our Supreme Court. *Pacific Telephone & Telegraph Co. v. Public Utilities Commission* (1965) 62 C2d 634. The "snap-shot" methodology here has been criticized as somehow attempting to predict exactly how the San Francisco Transit System will be operated during the next 45 years with an assumption that the system will have exactly the same configuration and be operated in exactly the same manner for each of the next 45 years. The City contends that Touche-Ross made no such assumption regarding any particular component of the Muni System in the future and concerned itself only with the net costs of developing the relevant unit of service, the passenger trip. The methodology used did in fact recognize that the system would in fact change in the future in ways which could not be accurately predicted and that the system in the year 2025 might well be a different system than existed in 1980-81. However, the Touche-Ross methodology also took into account that there had been significant changes in the Muni during the past 40 years including fare structure, types of vehicles used, route structures and volume of patronage with none of these changes resulting in the system as a whole becoming more productive. (RT 1452-53, 1747 (Firestone); RT 3977 (Stamm)). The Court concludes that there is a debatable rational basis for the Board of Supervisors accepting the Touche-Ross methodology and that the Touche-Ross methodology in all other respects were rationally based.

If the Court were to assume arguendo that the City may not extract a development fee which exceeds the Muni's actual incremental cost, and, assuming further, the elimination of policy driven lines and appropriate adjustment for the transfer rate, then the cost of $8.36 loss per square foot of office space would be reduced only to $7.55. (RT 4810 (Firestone); see also RT 4238-39 (Firestone)).

If fare evasion were taken into account, this adjustment would increase the cost per square foot by $.27. In combination, these two changes would result in the fee falling from $8.36 per square foot to $7.83. (See RT 4810 (Firestone)).

BRUCE BERNHARD ANALYSIS

When the TIDF was enacted, the Board of Supervisors relied upon an analysis of incremental transit costs prepared by Bruce Bernhard. (Ex. 502; see also Ex. 561). Bernhard concluded that the cost of incremental peak period transit services for the next 45 years exceeded $5.00 per square foot. The original cost calculation of $9.18 contained certain errors not in dispute and was recalculated at $6.57 per square foot. (Ex. 561). The Board in the 1984 amended Ordinance declared that "the principles to be employed in calculating the amount of the fee . . . are wholly consistent with the Board's intention in enacting the Transit Impact Development Fee Ordinance, with the cost analysis presented to the Board by Bruce Bernhard at the time the Ordinance was enacted . . . which estimate the Board accepts as reasonable . . .". (Section 4). Bernhard used a trip generation rate of .525 trips per square foot from data received from the San Francisco Department of Planning. (RT 323 (Bernhard)). At that time, it was the best available source of trip generation rate data. (RT 448, 449, 4058 (Bernhard); RT 2512 (Shao)). Two years later, City Planning revised its guidelines and as such, a .307 trips per square foot rate could be derived. As previously indicated, Barton-Aschman derived a trip rate of .64 trips per square foot, substantially higher than the rate used by Bernhard. Accordingly, it was not irrational for Bernhard to have used a .525 trip rate in his original analysis. Bernhard assumed a fast pass usage of 85% for incremental trips. This proved to be too optimistic.

However, the Gruen and Gruen survey of what consumers of Muni services would do at different assumed rate structures indicated that under a rate structure such as the one which had been adopted in 1980-1981, the fast pass usage would indeed be 85%. (RT 697-702, 4059-62 (Bernhard); Ex 23). Accordingly, Bernhard's assumption was not irrational. Bernhard made a simplifying assumption that inflation in the cost of transit would equal the return on the City's investments because he understood those investments would be made conservatively. (RT 332 (Bernhard)). In the context of Bernhard's total methodology he understated and overlooked other costs. That included omitting costs for transfer trips because of the then lack of reliable transfer data. (RT 4065-66 (Bernhard)). He assumed that each new bus would be filled to passenger capacity, where in fact the same is not practical. (RT 4066, 4110 (Bernhard); RT 4413-19 (Geissenheimer)). He used a peak hour trip rate when a peak period trip rate was called for by the Ordinance. (RT 4066-67 (Berhard)). He did not take into account the problem of fare evasion. (RT 4067 (Berhard)) He assumed an average trip rate of 33.5 minutes when in fact the average trip was longer (RT 4067-68 (Berhard); RT 3249 (Dineen)), thus, understating costs. (RT 3249-50, 3722 (Dineen)). He overstated the incremental cost of part-time labor. (RT 4063 (Bernhard)). And finally, he made an adjustment to the projected LRV costs to take account of possible abnormally high costs due to the phasing in of the LRVs and thus, understated costs. (RT 4064-65 (Bernhard); See Ex. 651 at p. 5 and n. 4). Were the Bernhard cost calculations revised to discount future costs to present value as used by Touche-Ross and were he to eliminate the LRV adjustment and use of a peak period trip rate—the total marginal costs of Muni trips per square foot of office space during its economic lifetime would be $6.24. This figure is derived by plugging in these corrections into Bernhard's transit fee formula. (See Ex. 109). In determining fees, the sound judgment of informed officials is a sufficient guide to the estimated costs of providing services. *Condit v. Solvang Mun. Improvement District* (1983) 164 C.A.3d 997, 1000. Accordingly, the Court concludes that the Bernhard analysis of costs of incremental peak period transit services for the next 45 years was a sufficient basis for the Board's legislative

judgment to impose a fee of $5.00 per square foot on the construction of new office buildings in San Francisco.

PROPOSITION XIIIA

Plaintiffs' specific claim is that the TIDF runs afoul of Article XIIIA, Section 4 of the California Constitution because it is a special tax which has not been adopted by a two-thirds vote. Article XIIIA, Section 4 provides:

> "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except *ad valorem* taxes on real property or a transaction tax or sales tax on the sale of real property within such city, county or special district."

The California Supreme Court has recently held that the term "special tax" and thus the ambit of Section 4 of Proposition XIII "must be strictly constured and ambiguities therein resolved so as to limit the measure to which Section 4 applies." *City and County v. Farrell* (1982) 32 Cal.3d 47, 52. In fact, no court has ever applied Proposition XIIIA to a development extraction. *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 C.A.3d 317. The payment of a fee as a condition for the privilege of development is not a "special tax" within the meaning of Section 4. *City Council v. South* (1983) 146 C.A.3d 320, 331. The TIDF does not violate State Constitution Article XIIIA.

PROPOSITION XIIIB

Plaintiffs contend that the TIDF seeks to appropriate money for expenditures in excess of the annual amounts permitted to be appropriated by Article XIIIB of the California Constitution.

Nothing in Article XIIIB restricts the power of a municipality to raise revenues, whether by fee or by tax. *City Council v. South* (1983) 146 C.A.3d 320, 333. Article XIIIB is a limitation on government expenditures, not on taxes or other revenues. *County of Placer v. Corin* (1980) 113 C.A.3d 443, 449.

Plaintiffs' contention is without merit.

EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS

When there is an equal protection or substantive due process challenge to a legislative classification, such as the TIDF, and neither a suspect class nor a fundamental right is involved the Court must adhere to the rational basis standard articulated previously. That is, the Court "must presume that the legislation creating the classification is constitutional, and determine only whether the distictions drawn in the legislation bear some rational relationship to a conceivable legitimate state purpose." *Civil Service Ass'n v. Civil Service Commission* (1983) 139 C.A.3d 449, 456.

The Board of Supervisors has made a determination to impose a portion of the added cost of providing transit service to new downtown buildings upon the developers of those buildings, rather than on all office building owners or on all taxpayers or on all users of public transportation. "There is no constitutional requirement that a regulation must reach every class to which it might be applied; that the legislature must be held rigidly to the choice of regulating all or none." *Norsco Enterprises v. City of Fremont* (1976) 54 C.A.3d 488, 497.

The construction of new office space in downtown San Francisco has in recent years occurred at an explosive rate. In the "Downtown Plan Environment Impact Report", Vol. II, (March, 1984) (Ex. 14C), it has been projected that downtown office space will expand by approximately 22.5 million square feet, as opposed to only 2 million square feet of retail space. Even if retail space were to have a higher peak period trip generation rate the vast majority of the additional peak period passengers would be generated by office buildings. The City could rationally decide to focus its attack on the problem of funding the costs of additional transit facilities on the type of real property development creating the greatest increase in peak period ridership. The TIDF does not violate the equal protection or substantive due process provisions of the Federal or State Constitutions.

PROCEDURAL DUE PROCESS

Plaintiff, CROCKER/PACIFIC GATEWAY claims that the TIDF violates their right of access to the courts. Specifically, Plaintiff argues that since the TIDF requires payment of the fee in advance, an acknowledgment of liability by the developer would result. This argument is easily dismissed. First, the developers have the option of paying the fee into an escrow account set up by stipulation of the parties. Second, a developer has the opportunity to challenge the fee by writ of mandamus before accepting a permit to build. *McLain Western #1 v. County of San Diego* (1983) 146 C.A.3d 772. Third, even if the mandamus remedy were not available, there would be no deprivation of due process. A person required to pay a fee to a governmental entity is not denied due process even where access to the Courts to challenge the fee is precluded as long as there is an administrative remedy available to hear a complaint concerning the fee. *Payne v. Superior Court* (1976) 17 C.A.3d 908, 914-17. In this case, Plaintiffs have an administrative remedy available to them since Sections 38.8, 38.15 and 38.17 of the Ordinance provide administrative means for developers to appeal fee determinations and collection disputes.

SAN FRANCISCO CITY CHARTER SECTION 3.598

Plaintiffs allege that the TIDF does not comply with Section 3.598 of the City Charter. This section provides that rates for public utilities in San Francisco should be fixed to cover the utilities' operating expenses, that the Board must approve by a two-thirds vote, rates which are inadequate to cover operating expenses, and that any shortfall in rates should be made up by tax levy.

However, the provisions of Section 3.598 do not apply to the TIDF. This charter section specifically excepts the Muni from the requirements of the section. The City Charter section was enacted in 1980, the TIDF in 1981. To hold that the charter section requirements apply to the TIDF would lead to absurd results. Such a result is in conflict with fundamental rules of statutory construction. *Carlton Santee Corp. v. Padre Dam Mun. Water*

Dist. (1981) 120 C.A.3d 14, 25. Moreover, even if the charter section did apply, it would not invalidate the TIDF because the Ordinance was enacted by a two-thirds majority called for in Section 3.598.

CONCLUSION

The Court concludes that the TIDF Ordinance is a valid exercise of local Police Power.

Defendant is entitled to its costs of Court. Defendant, CITY, is directed to prepare proposed Judgment in accordance with California Rules of Court.

Upon entry of Judgment in Action No. 780795, the Court will, on proper noticed motion, set for trial, "PACIFIC GATEWAY" and the "CROCKER" consolidated actions, Nos. 789365 and 790661, on the vested rights issue as to whether the TIDF Ordinance may be applied retroactively to property owners who obtained building permits prior to its adoption who were in the course of construction at the time of enactment.

DATED: January 4, 1985

MORTON R. COLVIN
Judge of the Superior Court

Appendix E

In the Court of Appeal of the
State of California
First Appellate District
Division Five
No. A030997

Russ Building Partnership,
Plaintiff and Appellant

v.

City and County of San Francisco,
Defendant and Appellee

[Filed August 28, 1987]

Notice of Appeal to the Supreme Court
of the United States

Notice is hereby given that plaintiff and appellant Russ Building Partnership hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California. The judgment of the Court of Appeal in this action was entered on January 20, 1987. The Supreme Court of the State of California denied Russ Building Partnership's petition for review on June 3, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: August 28, 1987.

PILLSBURY, MADISON & SUTRO
ALLAN N. LITTMAN
ROBERT M. WESTBERG
KEVIN M. FONG
DEBRA B. KEIL

By: ALLAN N. LITTMAN
Attorneys for Plaintiff
and Appellant
Russ Building Partnership

Appendix F

San Francisco Administrative Code

Chapter 38
Transit Impact Development Fee

Sec. 38.1. *Definitions.*

For the purposes of this Chapter, the following definitions shall apply:

(a) BOARD. The Board of Supervisors of the City and County of San Francisco.

(b) CERTIFICATE OF FINAL COMPLETION AND OCCUPANCY shall mean a certificate of final completion and occupancy issued by the Superintendent, Bureau of Building Inspection, pursuant to the Building Code.

(c) CITY. The City and County of San Francisco.

(d) DOWNTOWN AREA. That portion of the City bounded by Van Ness Avenue as far north as Broadway, from Van Ness Avenue and Broadway easterly on Broadway to Sansome Street, then northerly on Sansome Street to The Embarcadero, then southeasterly on The Embarcadero to Berry Street, then southwesterly on Berry Street to De Haro Street, then southerly on De Haro Street to Alameda Street, then westerly on Alameda Street to Bryant Street, then northerly on Bryant Street to Thirteenth Street, then westerly on Thirteenth Street to South Van Ness Avenue, then northerly to Van Ness Avenue. The downtown area includes all property with an address on any of or within the area surrounded by the above enumerated boundary streets.

(e) GROSS SQUARE FOOT OF OFFICE USE. A square foot of floor space within a structure, whether or not within a room, to be occupied by, or primarily serving, office use.

(f) NEW DEVELOPMENT. Any new construction, addition, extension, *conversion*, or enlargement of an existing structure which includes any gross square feet of office use.

(g) OFFICE USE. Any structure or portion thereof intended for occupancy by business entities which will primarily provide clerical, professional or business services of the business entity, or which will primarily provide clerical, professional or business services to other business entities or to the public, at that location.

(h) PEAK PERIOD. The total number of minutes in an average working day during which the passenger demand on the Municipal Railway system would require it to deploy all its operable equipment so that the system experiences no excess capacity.

(i) PUBLIC TRANSIT SERVICE. Services of the Municipal Railway of the City and County of San Francisco.

Sec. 38.2 *Findings.*

All office uses in the downtown area are benefitted by virtue of the availability of the Municipal Railway as a means of transit for employees and customers.

The demand for public transit service from downtown area office uses imposes a unique burden on the Municipal Railway, qualitatively different than the burden imposed by other uses of property in San Francisco. The need for that level of service provided by the Municipal Railway during peak periods can be attributed in substantial part to office uses of property in the downtown area.

New developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods.

This increased demand must be met not only by the acquisition of new rolling stock and the addition of new services, but also by the employment of additional personnel and fuel to operate the added facilities, and the maintenance, repair and replacement of the additional facilities as they wear out or become obsolete.

That level of additional cost incurred by the City in expanding and operating, maintaining, repairing and replacing its public transit facilities to accommodate the additional peak-period person-trips generated by office use in new developments can be translated into a cost per gross square foot of office use in the new developments. The cost of expanding current services and adding new services is directly proportional to the amount of peak-period Municipal Railway travel generated by new development. Development of office uses causes more additional Municipal Railway peak-period person-trips, per square foot, than the development of any other use of property in the downtown area. It is desirable to impose the increased burden of serving such use, through a fee approximating the cost per square foot, directly upon the developer of new development generating the need.

Sec. 38.3. *Purposes.*

In order to be able to provide public transit services for new development in the downtown area, the City must impose a fee. This fee shall be known as the Transit Impact Development Fee.

It is the purpose of this ordinance to require developers of new development in the downtown area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway both for initial capital outlay for the acquisition of rolling stock and the construction of facilities, and for the long term operation, maintenance and replacement of those facilities once they are in place.

The Transit Impact Development Fee is the most practical and equitable method of financing the construction and operation of required public transit service additions and improvements for the downtown area. This fee is intended to recover all costs incurred by the Municipal Railway in meeting peak-period public transit service demands created by office uses in each new development subject to the fee, including the expansion of service capacity through the purchase of rolling stock, the installation of new lines, the addition to existing lines and the long term operation, maintenance, repair and replacement of those expanded facilities.

The rate-making process established by this ordinance is intended to identify and measure the total incremental burdens

imposed on the City's Municipal Railway by virtue of the demands created by office uses in new development in the downtown area. Such burdens are to be allocated equitably among new developments in the downtown area subject to the Transit Impact Development Fee. This fee is designed to reflect the benefits conferred on new development because of the added peak-period capacity to carry the passengers generated by office uses in the new developments. Such benefits shall be measured in terms of the costs incurred by the City in expanding and operating the additional capacity in the downtown area required to meet the estimated long-term peak-period transit service needs of such office use in new development.

The Transit Impact Development Fee shall be collected as a condition for the issuance of a certificate of final completion and occupancy for new development in the downtown area.

This fee will enable the City to pay the capital and operating costs of all additional peak-period public transit services in the downtown area necessitated by office use in new development. The fee schedule shall be reviewed annually and adjusted over time to insure that it continues to reflect the projected cost of providing the additional public transit service required by new developments.

Notwithstanding the basic purposes of this ordinance, the Transit Impact Development Fee shall not exceed five dollars ($5.00) per square foot.

Sec. 38.4. *Imposition of Transit Impact Development Fee.*

Each developer of a new development in the downtown area shall pay to the City and County of San Francisco as a condition precedent to the issuance of a certificate of final completion and occupancy for such new development in the downtown area, a Transit Impact Development Fee. That fee shall be calculated on the basis of the number of gross square feet of office use added by the new development, multiplied by the per-square foot rate in effect (a) on the effective date of this ordinance for new developments for which building permits were issued prior to the effective date hereof, and (b) on the date of the filing of the building permit application as to all other new development. The rates

shall be established as a current estimate of the total cost incurred by the City in providing the additional peak-period Municipal Railway transit capacity necessitated by the public transit service needs generated by office uses in the new development over its estimated useful life.

The Central Permit Bureau may not issue a certificate of final completion and occupancy for any new development in the downtown area subject to the fee until it has received evidence of payment of the Transit Impact Development Fee (or of the initial installment if installment payment is permitted pursuant to Section 38.4) as set in accordance with Section 38.8 of this chapter.

The Fee imposed by this ordinance shall be payable with respect to (1) all new developments in the downtown area for which building permits are issued on or after the effective date of this ordinance, (2) such new developments in the downtown area for which building permits were issued prior to the effective date of this ordinance where the developers had, in receiving approval by the City Planning Commission, committed themselves to pay a reasonable fee or participate in an assessment district or other financing mechanism designed to enable the City to provide and operate additional peak-period public transit service necessary to accommodate the additional number of peak-period public transit service person-trips generated by office use in the new development, and (3) all other new developments in the downtown area for which building permits were issued prior to the effective date of this ordinance but which had not received a certificate of final completion and occupancy prior to the effective date of this ordinance.

* * * * *[1]

As to those new developments for which building permits are issued on or after the effective date of this ordinance, the Transit

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[1] Portions of the ordinance, added by amendment in 1982 (Ordinance No. 275-82), that are not relevant to the issues on appeal have been omitted so that this appendix reflects the ordinance as originally enacted in May 1981.

Impact Development Fee is to be paid on the earliest of the following dates:

(A) the date when fifty percent of the net rentable area of the project has been occupied

(B) eight (8) months after the date of issuance of the first temporary permit of occupancy with respect to any office use in the new development; and

(C) the date of issuance of a final certificate of occupancy.

As to those new developments subject to the Transit Impact Development Fee for which building permits have been issued prior to the effective date of this ordinance, the Transit Impact Development Fee shall be due on the effective date of this ordinance unless on that date none of the following has occurred:

(A) the date when fifty percent of the net rentable area of the project has been occupied;

(B) eight (8) months after the date of issuance of the first temporary permit of occupancy with respect to any office use in the new development;

(C) the date of issuance of a final certificate of occupancy; and

(D) the owner or developer has elected to make installment payments.

If none of the foregoing has occurred on the effective date of this ordinance, the Transit Impact Development Fee shall be due when the earliest of the foregoing occurs, except in the case of installment payments.

By electing to defer payment by delivery to the City of a written election acknowledging the obligation therefor, the owner of the new development may obligate itself to pay the fee in monthly installments of interest only, at the rate of one percent (1%) per month, for a period of five (5) years, and thereafter in level monthly payments of principal and interest, at the rate of one percent (1%) per month on the outstanding balance, amortizing over (1) the remaining useful life of the development or (2)

thirty (30) years, whichever is the shorter, such payments to be made on or before the first day of each calendar month during the payment period.

The first monthly installment of the Fee (if monthly installments are to be made) shall be due on the first day of the first calendar month following the date the Fee would otherwise become due and such first payment shall be prorated according to the number of days by which the due date follows the date the Fee would otherwise become due.

Sec. 38.5. *Transit Impact Development Fee Schedule.*

This Transit Impact Development Fee Schedule is set at an actuarially sound level to insure that the proceeds from the Transit Impact Development Fee from each new development will be sufficient, including such earnings as may be derived from investment of the proceeds and amortization thereof, to pay for all capital and operating costs incurred in providing and operating additional required peak-period public transit service capacity, over the life of such new development; without, however, exceeding five dollars ($5.00) per square foot.

The Transit Impact Fee Schedule shall be as follows:

FOR EACH GROSS SQUARE FOOT OF OFFICE USE IN NEW DEVELOPMENT IN THE DOWNTOWN AREA	$5.00*

*Formula fee rate calculated at (($5.06)) $9.18; limited to $5.00.

Sec. 38.6. *Adjustments to and Review of the Transit Impact Development Fee Schedule.*

The Transit Impact Development Fee Schedule as set forth in Section 38.5 shall be reviewed annually by the Board, or more often as it may deem necessary, to insure that, subject to the limit of five dollars ($5.00) per square foot, the fee accurately measures the cost of adding, operating, and maintaining the additional peak-period public transit service required by office uses in new development in the downtown area.

In determining the number of peak-period person-trips generated annually by office uses in new developments in the downtown area the Board shall obtain a report from the City Planning Commission. Such report shall estimate the number of peak-period person-trips generated annually per gross square foot of office use in new developments.

The Board shall obtain a report from the General Manager of Public Utilities regarding the then-current cost per peak-period Municipal Railway person-trip necessary to provide the expanded public transit services required by new development. The General Mananger shall also report the estimated useful life in years of new development, and may recommend different useful-life categories if deemed necessary or desirable to ensure a fair and accurate fee schedule.

The General Manager shall also report the projected annual increases in the cost per peak-period Municipal Railway person-trip necessary to provide the necessary additional transit services during the estimated useful lives of new developments. Finally, the General Manager shall report the estimated annual rate of return on the proceeds of this fee which would be invested prior to their use to provide the necessary additional transit services during the useful lives of new developments.

After receiving these reports and making them available for public distribution, the Board of Supervisors shall conduct a public hearing in which it shall consider these reports, hear testimony from any interested members of the public and receive such other evidence as it may deem necessary. At the conclusion of that hearing the Board shall determine the number of peak-period person-trips of the Municipal Railway generated annually per gross square foot of office use in new development. The Board shall also determine whether differing categories of useful lives expressed in years should be used to ensure a fair and accurate fee schedule, and if so what the different categories should be. The Board shall then determine the current cost per peak-period Municipal Railway person-trip for the additional peak-period service necessary to serve new developments. The Board shall also determine the appropriate annual rate of increase of the cost of providing additional peak-period Municipal Railway person-trips

and the appropriate annual rate of return on the invested proceeds of this fee.

The Board shall then establish a Transit Impact Development Fee Schedule expressed in terms of a sum per gross square foot for office use in new developments using the general formula: annual peak-period Municipal Railway person-trips per gross square foot times current cost per additional peak-period Municipal Railway person-trip times the persent value factor appropriate to the difference between the annual rate of cost increases and return on invested funds over the useful lives of new developments, establishing as many separate rates as are deemed appropriate to the determinations of useful life categories.

The rates of the fee schedule shall be set at an actuarially sound level to insure that the proceeds will be sufficient to pay for all capital and operating costs incurred in providing and operating additional required peak-period capacity, including such earnings as may be derived from investment of the proceeds and amortization thereof, over the life of such new developments; provided, however, that said sum may not, for any category of useful life, exceed five dollars ($5.00) per square foot.

In the event that the City shall impose and collect any additional fees or assessments specifically to recover the costs of transit services, including transit services the cost of which are included in the fee imposed by Section 38.4, the owner of a development for which the Transit Impact Development Fee has been fully paid shall annually receive a credit, up to the total amount of such fees or "assessments, of that portion of the prorated annual amount of the Transit Impact Development Fee equal to those costs of transit services included in such fees or assessments which are also included in the Transit Impact Development Fee:" The prorated annual amount of the Transit Impact Development Fee is obtained by dividing the total Transit Impact Development Fee already paid by the estimated useful life of the development, in years.

The portion credited against the such fees or assessments shall be determined by comparing those costs included in the Transit

Impact Development Fee and those included in such fees or assessments.

In the event that the City shall impose and collect any additional fees or assessments specifically to recover the costs of transit services, including transit services the cost of which are included in the fee imposed by Section 38.4, the owner of a development for which the Transit Impact Development Fee is being paid in installments shall annually receive a credit, up to the total amount of such fees or assessments, for that portion of such annual installment, whether interest only or principal and interest, equal to those costs of transit services included in such fees or assessments which are also included in the Transit Impact Development Fee.

In the event the City shall impose and collect any additional fees or assessments specifically to recover the costs of transit services, including transit services the cost of which are included in the fee imposed by Section 38.4, the owner of a development for which the Transit Impact Development Fee will be due but has not been paid shall receive a credit against the development fee otherwise due in an amount equal to that portion of the transit impact development fee equal to the value of those costs of transit services included in such fees or assessments which are also included in the Transit Impact Development Fee.

Sec. 38.7. *Use of Proceeds from Transit Impact Development Fee.*

The sums derived from the collection of the Transit Impact Development Fee shall be held in trust by the Treasurer of the City and shall be distributed according to the fiscal and budgetary provisions of the San Francisco Charter subject only to the following conditions and limitations. The proceeds from the Transit Impact Development Fee including earnings from investments thereof may be used only for the provision of peak-period public transit service over and above public transit service being provided on March 1, 1980, to and from and within the downtown area, to compensate for and to defray the capital and operating costs incurred by the City in providing the benefit of public transit service in the downtown area in order to meet the special peak-

period burden placed on the City by the addition of new office use in new developments in the downtown area of the City.

In the event a structure for which this Transit Impact Development Fee has been fully paid is demolished or converted to non-office use prior to the expiration of its estimated useful life, the City shall refund to the owner a portion of the amount of the fee determined by deducting an amount reflecting the duration of the office use in relation to the useful life estimate used in determining the Transit Impact Development Fee for that structure. In the event a structure for which the Transit Impact Development Fee is being paid in installments is demolished or converted to non-office use prior to the final payment, installments shall continue only until the principal obligation is reduced to the amount which would have been refunded if the Transit Impact Development Fee had been fully paid. In the event a building permit expires prior to completion of the work and commencement of occupancy, so that it will be necessary to obtain a new permit to carry out new development, the obligation to pay the fee shall be cancelled, and any amount previously paid shall be refunded.

Sec. 38.8. *Setting of Fee.*

Each developer, prior to obtaining a building permit for any new development in the downtown area after the effective date of this ordinance, shall file with the General Manager of the Public Utilities Commission, on such forms as he may develop, a report indicating the number of gross square feet of the new development intended for office use. Each developer of a new development for which a building permit was issued prior to the effective date of this ordinance and for which a final certificate of occupancy had not been issued prior to the effective date of this ordinance shall file the same report prior to obtaining a final certificate of occupancy. The General Manager shall determine the number of gross square feet of office use to which the Transit Impact Development Fee Schedule applies, crediting the number of gross square feet of office use being eliminated as part of the project and disregarding the number of gross square feet of office use being retained determine the useful life category if the Fee Schedule includes useful life categories, apply the fee schedule, and determine the fee which reflects the additional cost of peak-

period public transit service generated by the office use in the new development.

The applicant shall be notified of the General Manager's determination in writing. The General Manager shall mail a copy of his determination to the applicant. The applicant may appeal the determination of the number of gross square feet of office use subject to the fee, or the useful-life category if the fee schedule includes useful life categories, to the Public Utilities Commission in order to reduce the amount of the fee obligation. If the applicant notifies the General Manager of his acceptance of the determination, or does not appeal to the Public Utilities Commission within 15 days of the date of personal service or mailing of notice of the General Manager's determination, the General Manager's determination shall be final, and a notice of such determination shall be provided the Central Permit Bureau.

The Central Permit Bureau may not issue a building permit for any new development in the downtown area until it has received notice from the General Manager of the Public Utilities Commission or the Public Utilities Commission of the final determination of the amount of the Transit Impact Development Fee to be paid.

Sec. 38.9. *Rules and Regulations.*

The Public Utilities Commission is empowered to adopt such rules, regulations, and administrative procedures as it deems necessary to implement this chapter, including the determination, collection, refund, and utilization of the proceeds, of the Transit Impact Development Fee.

Sec. 38.10. *Non-payment; Additional Request.*

Where installment payment of the Transit Impact Development Fee has been initiated pursuant to Section 38.4 and any installment of the fee is not paid within sixty (60) days following the date fixed for payment of the installment, the Public Utilities Commission shall personally serve or mail to the owner of the new development for which said Transit Impact Development Fee is unpaid a request for payment.

The written request shall advise the owner that if he fails to pay the amount due, the General Manager in a noticed public hearing

will add to the fee installment a 10% penalty and that a lien for the entire unpaid balance, including penalty on the installment, and with interest accruing on the entire unpaid balance, will be recorded against the real property to which the public transit service is rendered.

Sec. 38.11. *Lien Proceedings; Notice.*

If payment of the installment is not received within thirty (30) days following mailing of the additional request, the General Manager of the Public Utilities Commission shall initiate proceedings, by reporting the delinquency to the Board, to make the entire unpaid balance of the Transit Impact Development Fee, including penalty on the unpaid installment, a special assessment lien against the property served. Such charges against delinquent accounts shall be reported to the Board at least once each year. Said report for each such delinquent account shall contain the owner's name, the amount due, including penalty, the amount of the unpaid balance, including penalty on the delinquent installment, and a description of the parcel served. The General Manager of the Public Utilities Commission shall also indicate which of such delinquent accounts should be exempted from the lien procedure because of the small amounts involved, or because another debt collection procedure is more appropriate. The descriptions of the parcels shall be those used for the same parcels on the Assessor's map books for the current year. Upon receipt of such report the Board shall fix a time, date and place for hearing the report and any protest or objections thereto, and shall cause notice of the hearing to be mailed to each owner of the parcels of real property described in the report not less than ten (10) days prior to the date of hearing.

Sec. 38.12. *Hearing.*

At the time fixed for consideration of the report the Board shall hear it with any objections of the owners of the parcels liable to be assessed for delinquent accounts. The Board may make such revisions, corrections or modifications of the report as it may deem just; and in the event that the Board is satisfied with the correctness of the report (as submitted or as revised, corrected or modified), it shall be confirmed. The decision of the Board on the

report and on all protests or objections thereto shall be final and conclusive; provided, however, any delinquent account may be removed from the report by payment in full at any time prior to confirmation of the report. The Clerk of the Board shall cause the confirmed report to be verified in form sufficient to meet recording requirements.

Sec. 38.13. *Collection of Assessment.*

Upon confirmation of the report by the Board, the delinquent charges contained therein shall constitute a special assessment against the parcels to which the services were rendered.

Each such assessment shall be subordinate to all existing special assessment liens previously imposed upon such parcels and paramount to all other liens except those for state, county and municipal taxes with which it shall be upon parity. The lien shall continue until the assessment and all interest and penalties due and payable thereon are paid. All laws applicable to the levy, collection and enforcement of municipal taxes shall be applicable to said special assessment.

Sec. 38.14. *Recordation; Charges.*

The Clerk of the Board shall cause the confirmed and verified report to be recorded in the County Recorder's office and the special assessment lien on each parcel of property described in said report shall carry additional charges for administrative expenses of fifty dollars ($50.00) or ten percent (10%) of the amount of the unpaid balance, including penalty, whichever is higher, and a rate of one and one-half percent (1½%) per full month compounded monthly from the date of the recordation of the lien on all charges due.

Sec. 38.15. *Filing with Controller and Tax Collector; Distribution of Proceeds.*

The Clerk of the Board shall file a certified copy of each confirmed report with the Controller and Tax Collector within ten (10) days after confirmation of the report, whereupon it shall be the duty of said officers to add the amount of said assessment to the next regular bill for taxes levied against said parcel or parcels of land for municipal purposes, and thereafter said amount shall

be collected at the same time and in the same manner as City and County taxes are collected, and shall be subject to the same procedure under foreclosure and sale in case of delinquency as provided for property taxes of the City and County of San Francisco.

Except for the release of lien recording fee authorized in Section 38.16, all sums collected by the Tax Collector pursuant to this ordinance shall be held in trust by the Treasurer and distributed as provided in Section 38.6 of this Chapter.

Sec. 38.16. *Release of Lien, Recording Fee.*

On payment to the Tax Collector of the special assessment, the Tax Collector shall cause to be recorded a Release of Lien with the County Recorder, and from the sum collected pursuant to Section 38.15, shall pay to the County Recorder a recording fee of Six Dollars ($6.00).

Sec. 38.17. *Manner of Giving Notices.*

Any notice required to be given hereunder by the Board or the Public Utilities Commission to an owner shall be sufficiently given or served upon the owner for all purposes hereunder if personally served upon the owner or if deposited, postage prepaid, in a post office letter box addressed in the name of the owner at the official address of the owner maintained by the Tax Collector of City for the mailing of tax bills or, if no such address is available, to the owner at the address of the real property to which the public transit service was provided.

Sec. 38.18. *Severability.*

The provisions of this Ordinance shall not apply to any person, association, corporation or to any property as to whom or which it is beyond the power of the City and County of San Francisco to impose the fee herein provided. If any sentence, clause, section or part of this Ordinance, or any fee imposed upon any person or entity is found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality, or invalidity shall affect only such clause, sentence, section or part of this ordinance, or person or entity, and shall not affect or impair any of the remaining provisions, sentences, clauses, sections or other parts of this

Ordinance, or its effect on other persons or entities. It is hereby declared to be the intention of the Board of Supervisors of the City that this Ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part of this Ordinance not been included herein, or had such person or entity been expressly exempted from the application of this Ordinance. To this end the provisions of this ordinance are severable.

Appendix G

AMENDMENT OF THE WHOLE
As Amended in Bd. 5/4/84

FILE NO. 199-84-1

ORDINANCE NO. 224-84

(TIDF)

AMENDING CHAPTER 38 OF THE SAN FRANCISCO ADMINISTRATIVE CODE BY AMENDING SECTIONS 38.1, 38.2, 38.5 AND 38.8 THEREOF AND BY ADDING SECTION 38.8.5 THERETO RELATING TO THE PRINCIPLES TO BE USED IN CALCULATING THE AMOUNT OF THE TRANSIT IMPACT DEVELOPMENT FEE AND PROVIDING FOR ADJUSTMENT TO THE TRANSIT IMPACT DEVELOPMENT FEE IN CASES OF CONVERSION FROM OTHER USES TO OFFICE USE TO INCORPORATE THE TRIP GENERATION RATE OF PRIOR USE SO AS TO ACCURATELY MEASURE THE INCREMENTAL IMPACT OF THE CONVERSION TO OFFICE USE ON THE SAN FRANCISCO MUNICIPAL RAILWAY.

NOTE: Additions or substitutions are underlined; deletions are indicated by ((double parentheses)).

Be it ordained by the people of the City and County of San Francisco:

Section 1. Sections 38.1, 38.2 and 38.5 of Chapter 38, the San Francisco Administrative Code, are hereby amended to read as follows:

Section 38.1. *Definitions.*

For the purposes of this chapter, the following definitions shall apply:

(a) BOARD. The Board of Supervisors of the City and County of San Francisco.

(b) CERTIFICATE OF FINAL COMPLETION AND OCCUPANCY shall mean a certificate of final completion and

occupancy issued by the Superintendent, Bureau of Building Inspection, pursuant to the Building Code.

(c) CITY. The City and County of San Francisco.

(d) DOWNTOWN AREA. That portion of the City and County bounded by Van Ness Avenue as far north as Broadway, from Van Ness Avenue and Broadway easterly on Broadway to Sansome Street; then northerly on Sansome Street to the Embarcadero; then southeasterly on the Embarcadero to Berry Street; then southwesterly on Berry Street to De Haro Street; then southerly on De Haro Street to Alameda Street; then westerly on Alameda Street to Bryant Street; then northerly on Bryant Street to Thirteenth Street; then westerly on Thirteenth Street to South Van Ness Avenue; then northerly to Van Ness Avenue. The downtown area includes all property with an address on any of or within the area surrounded by the above enumerated boundary streets.

(e) GROSS SQUARE FOOT OF OFFICE USE. A square foot of floor space within a structure, whether or not within a room, to be occupied by, or primarily serving, office use.

(f) NEW DEVELOPMENT. Any new construction, addition, extension, conversion, or enlargment of an existing structure which includes any gross square feet of office use.

(g) OFFICE USE. Any structure or portion thereof intended for occupancy by business entities which will primarily provide clerical, professional or business services of the business entity, or which will primarily provide clerical, professional or business services to other business entities or to the public, at that location.

(h) PEAK PERIOD. The total number of minutes in an average working day, determined in accordance with Section 38.5(a), during which ((the passenger demand on)) the Municipal Railway ((system would require it to deploy)) deploys all its operable equipment so that the system experiences no excess vehicular capacity.

(i) PUBLIC TRANSIT SERVICE. Services of the Municipal Railway of the City and County of San Francisco.

Section 38.2. *Findings.*

All office uses in the downtown area are benefited by virtue of the availability of the Municipal Railway as a means of transit for employees and customers.

The demand for public transit service from downtown area office uses imposes a unique burden on the Municipal Railway, qualitatively different than the burden imposed by other uses of property in San Francisco. The need for that level of service provided by the Municipal Railway during peak periods can be attributed in substantial part to office uses of property in the downtown area.

New developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods.

This increased demand must be met not only by the acquisition of new rolling stock and the addition of new services, but also by the employment of additional personnel and fuel to operate the added facilities, and the maintenance, repair and replacement of the additional facilities as they wear out or become obsolete.

That level of additional cost incurred by the City in expanding and operating, maintaining, repairing and replacing its public transit facilities to accommodate the additional peak-period person-trips generated by office use in new developments can be translated into a cost per gross square foot of office use in the new developments. The cost of expanding current services and adding new services is directly proportional to the amount of peak-period Municipal Railway travel generated by new development. Development of office uses causes more additional Municipal Railway peak-period person-trips, per square foot, than the development of any other use of property in the downtown area. It is desirable to impose the increased burden of serving such use, through a fee approximating the cost per square foot, directly upon the developer of new development generating the need.

Even though other uses such as retail use also generate Municipal Railway peak-period person trips (and even if a particular alternate use were to generate more such trips than do office uses), the Board refrains from imposing the Transit Impact Development Fee on such uses at this time, and in that regard finds: (1) The vast majority of new commercial space in the downtown area will be devoted to office uses, and the primary cause for new peak-period Municipal Railway passengers will be the development of new office uses; and (2) a significant proportion of the new retail and service uses which will hereafter be developed in the downtown area will be constructed in connection with new office developments and, for that reason, limitation of the Fee to office uses both ameliorates the economic impact of the Fee on developers of office space and encourages the development of projects with mixed uses consisting of office, retail and service uses.

Sec. 38.5. *Transit Impact Development Fee Schedule.*

This Transit Impact Development Fee Schedule is set at an actuarially sound level to insure that the proceeds from the Transit Impact Development Fee from each new development is sufficient, including such earnings as may be derived from investment of all proceeds and amortization thereof, to pay for all capital and operating costs incurred in providing and operating additional required peak-period public transit service capacity, over the life of such new development; without, however, exceeding five dollars ($5.00) per square foot.

The following principles have been and, in the future, shall be observed in calculating the amount of the Fee:

(a) The times during the day which constitute the peak period shall be determined functionally as that period of time during which a decision to add additional scheduled vehicle runs would require Muni to purchase or lease additional vehicles because the existing available fleet is fully committed in the sense that vehicles are actually in revenue service, being held for deployment later in the peak period, in reserve, or scheduled for repair or preventive maintenance.

(b) State, federal and private operating and capital subsidies for the cost of providing additional peak period service shall be assumed only when and to the extent that receipt of such subsidies is reasonably probable.

(c) The calculation of future costs of providing service for additional passengers during the peak periods should assume no increase in the level of crowding for the system as a whole or material decreases in the frequency of service.

(d) The cost of electricity shall be calculated based on the price which the City could receive for such power were it sold to PG&E assigned customers rather than the cost at which it is furnished to the Municipal Railway by the Hetch Hetchy Water and Power Department.

(e) Costs and revenue attributable to trips taken outside the peak periods by office workers and visitors shall not be included.

(f) In calculating the revenue from additional peak period trips, a weighted average fare (reflecting the frequency of trips paid for by cash fares as opposed to fast passes) shall be estimated. In making this calculation, the average fare for a fast pass trip shall be determined by dividing the cost of a fast pass by an estimate of the total number of trips per month (whether or not taken in the peak period) which will be taken by a fast pass purchaser. In projecting future revenues, peak period revenue shall be assumed to increase at the same rate as peak period operating costs.

(g) Where feasible, actual information for the fiscal year for which the fee is being calculated should be used. Where estimates must be made, those estimates should be based on such information as the General Manager of the Public Utilities Commission or his delegate considers reasonable for the purpose. Possible changes in the operation or productivity of the Municipal Railway shall be taken into account only if such changes are the announced policy of the Municipal Railway or the Public Utilities Commission and the impact of such change on peak period costs or revenues can be estimated with reasonable certainty.

The Transit Impact Fee Schedule shall be as follows:

FOR EACH GROSS SQUARE FOOT OF OFFICE USE IN NEW DEVELOPMENT IN THE DOWNTOWN AREA	$5.00*

*Formula fee rate calculated ((at $9.18)) to be in excess of $5.00; limited to $5.00.

Section 2. Section 38.8 of Chapter 38 of the San Francisco Administrative Code is hereby amended to read as follows:

Section 38.8. *Setting of Fee.*

Each developer, prior to obtaining a building permit for any new development in the downtown area after the effective date of this ordinance, shall file with the General Manager of the Public Utilities Commission, on such form as he may develop, a report indicating the number of gross square feet of the new development intended for office use. Each developer of a new development for which a building permit was issued prior to the effective date of this ordinance and for which a final certificate of occupancy had not been issued prior to the effective date of this ordinance shall file the same report prior to obtaining a final certificate of occupancy. The General Manager shall determine the number of gross square feet of office use to which the Transit Impact Development Fee Schedule applies, ((crediting the number of gross square feet of office use being eliminated as part of the project and)) disregarding the number of gross square feet of office use being retained, determine the useful life category if the Fee Schedule includes useful life categories, apply the fee schedule, and determine the fee which reflects the additional cost of peak-period public transit service generated by the office use in the new development. The applicant shall be notified of the General Manager's determination in writing. The General Manager shall mail a copy of his determination to the applicant. The applicant may appeal the determination of the number of gross square feet of office use subject to the fee, the adjustment factor described in Section 38.8.5(b), or the useful-life category if the fee schedule includes useful life categories, to the Public Utilities Commission in order to reduce the amount of the fee obligation. If the applicant notifies the General Manager of his acceptance of

the determination, or does not appeal to the Public Utilities Commission within 15 days of the date of personal service or mailing of notice of the General Manager's determination, the General Manager's determination shall be final, and a notice of such determination shall be provided the Central Permit Bureau. The Central Permit Bureau may not issue a building permit for any new development in the downtown area until it has received notice from the General Manager of the Public Utilities Commission or the Public Utilities Commission of the final determination of the amount of the Transit Impact Development Fee to be paid.

Section 3. Chapter 38 of the San Francisco Administrative Code is hereby amended by adding Section 38.8.5 thereto, reading as follows:

Section 38.8.5. Credits for Prior Use.

In determining the number of gross square feet of office use to which the Transit Impact Development Fee Schedule applies, the General Manager shall provide for the following credits:

a. For prior office uses, there shall be a credit for the number of gross square feet of office use being eliminated as part of the project.

b. For prior uses other than office use, there shall be a credit for the number of gross square feet of non-office use being eliminated multiplied by an adjustment factor to reflect the difference between office building peak period municipal railway trip generation rates and peak period municipal railway trip generation rates for other uses. The adjustment factor shall be determined by the General Manager as follows:

(1) The adjustment factor shall be a fraction, the numerator of which shall be the peak period municipal railway trip generation rate which the General Manager shall determine, in consultation with the Department of City Planning applies to the class of prior use being eliminated by the project.

(2) The denominator of the fraction shall be the peak period municipal railway trip generation rate for office use used in the most recent calculation of the Transit Impact Development Fee Schedule approved by the Board of Supervisors.

(3) Not withstanding the foregoing, the adjustment factor shall not exceed 1.

Section 4. The Board finds and declares that the principles to be employed in calculating the amount of the fee as set forth in Section 1 above are wholly consistent with the Board's intention in enacting the Transit Impact Development Fee Ordinance, with the cost analysis presented to the Board by Bruce Bernhard at the time the ordinance was enacted (which, after correction of certain errors, estimated the loss per square foot to be $6.57, which estimate the Board accepts as reasonable), with the Transit Impact Development Fee Cost Studies for fiscal years 1980-81 and 1981-82 approved by the Board by Resolution 880-83, and with the revised Transit Impact Development Fee Cost Study prepared by Touche Ross & Co. dated February 22, 1984 making certain revisions to the estimation of the FY 1980-81 net present value of the loss which would be incurred in providing additional peak-period transit service (resulting in a net reduction of said loss from $8.60 to $8.36 per square foot). The Board hereby approves the assumptions, methodology and conclusions stated in said revised Transit Impact Development Fee Cost Study. The Board accordingly finds that as of the date the Ordinance was enacted, and at all times thereafter, the net present value of the loss which would be incurred in providing additional peak period transit service was in excess of $5.00 per square foot.

Section 5. The Board of Supervisors intends that the portion of the amendment to Chapter 38 adding Section 38.8.5 be given full retroactive effect so that the credits allowed by Section 38.8.5 shall be afforded to all developers who have paid the fee or will hereafter be required to do so.

Section 6. The amendments to Chapter 38 set forth in Sections 2 and 3 of this ordinance shall not be effective unless and until, prior to June 25, 1984, the City Attorney has advised the Clerk of the Board that either (1) the Superior Court for the County of San Francisco has entered an order approving a partial settlement of Russ Building Partnership, et al. v. City and County of San Francisco, No. 780-795, providing that no claims for costs, attorney's fees or expenses be sought by the class action plaintiff therein on account of the adoption of Section 2 and 3 of this

ordinance; or, alternatively, (2) that the Superior Court has determined that no such court order appproving such partial settlement is required by law.

Supreme Court, U.S.
FILED
SEP 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-398

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RUSS BUILDING PARTNERSHIP,
a California general partnership,
Appellant,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California

APPELLEES' RESPONSE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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No. 87-398

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Appellees.

On Appeal from the Court of Appeal of the State of California

APPELLEES' RESPONSE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

APPELLEES' INTEREST

Appellant has designated Pacific Gateway Associates Joint Venture ("Pacific Gateway") and Crocker National Bank and Crocker Properties, Inc. ("Crocker") as appellees. Pacific Gateway and Crocker are each developers of downtown office buildings upon whom the City and County of San Francisco ("the City") has imposed the $5 per square foot transit fee. As applied to *each* of these appellees, based upon the square footage of their office properties, the transit fee is nearly *$2.5 million.*

Pacific Gateway and Crocker were plaintiffs in actions below challenging the constitutionality of the Transit Impact Development Fee Ordinance. These actions were consolidated with the Russ Building Partnership case in the California trial court and

Court of Appeal. In these actions, appellees asserted Takings Clause, Due Process and Equal Protection challenges to the validity of the Transit Impact Development Fee Ordinance under the Fifth and Fourteenth Amendments. The California courts rejected each of these challenges.[1] Pursuant to Rule 10.4 of the Rules of this Court appellees file this response in support of appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

In June of 1978 the California voters, by a ballot initiative known as "Proposition 13," enacted an amendment to their state constitution placing limitations upon the ability of local governments to assess property taxes and other special taxes. California Constitution, Article XIIIA, §§ 1 and 4. In prior years the City had operated the Municipal Railway, the City's public transit

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[1] In addition to these grounds, Pacific Gateway and Crocker challenged the retroactive application of the transit fee to their office projects (for which building permits had been issued two years prior to the enactment of the Ordinance) as a violation of their vested rights. This separate challenge to the Ordinance was also based upon the Fifth and Fourteenth Amendments. This challenge was sustained by the California Court of Appeal in Part V of the decision here appealed from by the Russ Building Partnership. (Jurisdictional Statement, Appendix A, pp. A-11 through A-16.)

The City petitioned for review by the California Supreme Court of that portion of the Court of Appeal's opinion sustaining appellees' vested rights claims. On June 3, 1987, the California Supreme Court granted review limited to that issue. (Jurisdictional Statement, Appendix B.) California Rules of Court, Rule 29.2(b). Oral argument took place on September 8, 1987 and the matter is now submitted to the California Supreme Court. No judgment has been entered in either the Pacific Gateway or the Crocker case. If the California Supreme Court were to reverse that portion of the California Court of Appeal's ruling striking down the retroactive application of the transit fee to Pacific Gateway and Crocker, these appellees would then file their own appeal to this Court from the resulting judgment. That appeal would include the challenges to the transit fee under the Takings Clause, the Due Process Clause and the Equal Protection Clause that appellees raised in the California courts and are raised here by appellant.

system, at a deficit, with operating costs exceeding fare revenues and federal and state grant monies. This deficit was historically financed from the City's general fund. Upon the passage of Proposition 13, San Francisco officials contemplated that the newly enacted limitations on the City's ability to increase property tax revenues would limit the availability of monies from the general fund to meet the Municipal Railway's operating deficit. These officials contemplated that new funding sources would therefore be required to finance the Municipal Railway. (Joint Appendix Exhibits 64, 67 and 68.)[2]

In response to the passage of Proposition 13, the City began investigating potential new revenue sources for the Municipal Railway. City officials considered the creation of a special assessment district encompassing downtown San Francisco (*Id.*). They also considered the enactment of a variety of special taxes to partially underwrite the Municipal Railway's operating deficit. (Joint Appendix Exhibits 85, 86, 91 and 92.) Ultimately, attempts to finance the Municipal Railway through an assessment district or special taxes were abandoned as impractical because of the requirements of California law.[3]

Instead, in early 1980, City officials seized upon the concept of using a "development fee," applicable only to new downtown office buildings and imposed as a condition to the issuance of building permits, as the most politically feasible new revenue source for the Municipal Railway. (Joint Appendix Exhibit 85.)

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[2] In the consolidated proceedings before the California Court of Appeal, appellees proceeded by a joint appendix in lieu of a clerk's transcript. California Rules of Court, Rule 5.1(b). The designated references are to the Joint Appendix in the California Court of Appeal.

[3] California law places legal and practical constraints upon local governments' ability to levy assessments and special taxes. The formation of an assessment district requires a showing of special benefit to the affected properties and is subject to rights of majority protest. California Constitution Article XVI, § 19. Local governments can levy "special taxes" only with a two-thirds vote of the electorate. California Constitution Article XIIIA, § 4. *See Candid Enters., Inc.* v. *Grossmont Union High School Dist.*, 39 Cal. 3d 878, 882, 705 P.2d 876 (1985).

To generate the desired new revenue, the City made projections which purported to justify a $5 per square foot fee. This figure was stated to reflect the present value of the *projected deficits* that the Municipal Railway would incur over a *45-year period* in providing peak period transit service to the additional riders who it estimates will use the public transit system to commute to and from their jobs in newly constructed downtown offices.[4]

As the Court of Appeal decision states, "the fee [was] designed to provide *revenue* for the San Francisco Municipal Railway system" to accommodate the peak period riders employed in new downtown offices. (Jurisdictional Statement, Appendix A, p. A-2, emphasis added.) The transit fee was presented to the San Francisco Board of Supervisors in 1981 as part of a "revenue package" formulated by City officials in response to Proposition 13 in order to supplement the Municipal Railway's budget. (Trial Exhibit 502.) As calculated and applied, the transit fee indeed provided a generous new revenue source to the City. Based upon the City's 45-year projections of *operating* and capital deficits and its insistence that these projected costs be calculated "up front" in a single lump sum, property owners are subjected to multi-million dollar fees as a condition to the occupancy of their buildings.

"Development fees" have previously been used to finance the acquisition or construction of schools, parks, recreation lands and other real improvements or facilities. They have been based upon the rationale that new development has caused a special need for such improvements—and will derive special benefit from them. *See* discusssion, § I, *infra*. The transit fee differs radically from any other development fee of which appellees are aware. Unlike any other development fee, the transit fee is primarily designed to

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[4] The transit fee thus imposes on a select group of property owners the burden of subsidizing the costs of potentially self-supporting public transit, which the City for political and social reasons chooses to provide to the public at below-cost fares. This "subsidy" and its burden on the general fund is the only "cost" that the City seeks to recoup or mitigate by the transit fee. The use of a fee to impose the cost of such a subsidy upon private parties in itself effects an unconstitutional taking. *Property Owners Ass'n* v. *Township of N. Bergen*, 74 N.J. 327, 378 A.2d 25, 29-30 (1977).

recoup and defray the ongoing *operating costs* of the San Francisco Municipal Railway. (Trial Exhibits 39 and 54.)[5] Thus, the transit fee's proceeds will be used to pay for bus driver salaries, fuel, maintenance and innumerable other *operating costs. (Id.)* These are not costs or burdens that only new office development imposes upon the City and its general fund. On the contrary, by the City's own admission, *all downtown office buildings (whenever they were built) generate identical ongoing ridership demands* on the San Francisco Municipal Railway. (Trial Exhibit 54.) The City incurs and will continue to incur *ongoing* operating costs to provide public transit to all of these structures. All of these buildings benefit equally from the continued operation of the Muncipal Railway and the City's political decision to subsidize its operation.[6]

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[5] The transit fee ordinance provides that the proceeds of the fee shall be used "for the provision of peak period public transit service . . . to defray capital *and operating costs* incurred by the City . . . " (Jurisdictional Statement, Appendix F, pp. F-10 and F-11.) In fact, operating costs comprise the lion's share of the costs projected by the City to support the transit fee. (Trial Exhibits 39 and 54.) Under the Ordinance, the City is free to apply *all* of the proceeds of the transit fee to these projected operating costs.

The "capital" costs included in the City's projections underlying the transit fee are the costs of acquiring and replacing vehicles such as busses and trolly cars. Because these vehicles all have finite lives and require ongoing replacement, even these projected "capital" costs reflect the type of "burden" which all downtown properties continue to impose on the Municipal Railway. *See* discussion, § I, *infra.*

[6] For example, the Transamerica Pyramid is a well recognized downtown office building on the San Francisco skyline, constructed prior to 1979. That building "generates" Municipal Railway ridership at the same rate per square foot as appellees' projects. Because the Transamerica Pyramid has *more* square feet than either of appellees' projects, it actually generates *more* peak period Municipal Railway riders (and therefore more ongoing operating costs) than either of appellees' projects. The same could be said for innumerable other downtown San Francisco offices built prior to 1979, some of which are *four times* the size of appellees' buildings. (Joint Appendix Exhibit 94.) None of these buildings are subject to the transit fee.

In attempting to recoup the ongoing costs of providing a public service such as the Municipal Railway, the transit fee is indisputably unlike any police power exaction or condition that has ever passed judicial muster.[7] No other court has ever held that a "development fee" may be used to finance the ongoing costs of a municipal service. No other court has ever held that a development fee could be used to finance the ongoing costs of operating (as opposed to acquiring or constructing) local school, library or fire facilities. No other court has ever held, for instance, that a development fee may be used to defray police, firefighter, teacher or transit worker *salaries*. No other court has ever held that an exaction designed to recoup these types of costs (which all property owners impose on the local government on an ongoing basis) could be levied against developers of new property alone. The California courts' validation of the use of a development fee to so finance the Municipal Railway is simply without precedent in the cases.

In light of the foregoing, counsel for the City aptly described the California Court of Appeal's decision upholding the transit fee as "breaking new ground" nationally.[8] Nothwithstanding the unprecedented characteristics of the transit fee and the enormous import of its ruling, the California Court of Appeal, at the City's

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[7] The California Court of Appeal simply glossed over this critical distinction between the transit fee and all other development fees, stating "[t]here is little difference between these public improvements [streets, sewers, parks and lights] and the benefits to the public from the increased transit services paid for by the transit fee." (Jurisdictional Statement, Appendix A, p. A-5.) This statement simply ignores the real difference between the transit fee and all other development fees and its constitutional significance. *See* discussion, § I, *infra*.

[8] A January 22, 1987 San Francisco Examiner article on the California Court of Appeal's decision reported as follows:

> The appeals court ruling is significant because it "breaks new ground" nationally, observed Jerome Falk, a private attorney representing The City. "There has never been a development fee for transit anywhere in the country," Falk said, adding that the decision supports establishment of development fees by cities to fund *services* other than the more traditional schools, parks and roads.

urging, rejected appellees' constitutional challenges to the Ordinance without any analysis of governing Fifth Amendment principles.[9] Thus, the California Court of Appeal dismissed appellees' Takings Clause in *less than one sentence.* (Jurisdictional Statement, Appendix A, p. A-9.) The Court of Appeal's decision does not include *a single citation to any of this Court's opinions construing the Fifth Amendment's Takings Clause. (Id.)* Instead, the California Court of Appeal stated:

> We are mindful of the local government's need to generate revenue to maintain the quality of life the residents of the city have come to expect. This has become increasingly difficult in the post-Proposition 13 era.

(*Id.* at p. A-11.)

The California Court of Appeal has simply ignored the basic principle that underlies the Takings Clause:

> [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922).

The ruling below ignores appellees' rights under the Fifth and Fourteenth Amendments. It specifically ignores the Fifth Amendment principles under which development conditions such as the transit fee must be judged under this Court's decision in *Nollan v. California Coastal Commission,* 107 S. Ct. 3141 (1987). The ruling below, which the City's counsel has already heralded to the nation's municipalities as providing a blueprint for the formulation of similar fees, will profoundly impact against the rights of property owners throughout the United States if not reversed by this Court.

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[9] In the California courts the City argued that the Fifth Amendment simply had *no* application to development fees or, alternatively, entailed a standard of review no different from that applied to a substantive Due Process challenge. (Joint Appendix Exhibits 31 and 32.) Based on these arguments, the trial court also summarily dismissed appellees' Takings Clause argument in a *single, two-sentence paragraph.* (Jurisdictional Statement, Appendix D, p. D-8.)

THE QUESTIONS ARE SUBSTANTIAL

I

THE FIFTH AMENDMENT PROHIBITS THE USE OF A DEVELOPMENT FEE TO FINANCE THE OPERATING COSTS OF A PUBLIC TRANSIT SYSTEM SUCH AS THE MUNICIPAL RAILWAY

"Development fees" have their origin in cases which recognize the power of local government to condition development upon the dedication of land for public works and facilities (*e.g.*, sewers, streets and public lighting) necessary to service the improved property. Such dedication requirements, typically imposed in the subdivision context, have been upheld in California and other jurisdictions. *See Ayres v. City Council of Los Angeles,* 34 Cal. 2d 31, 207 P.2d 1 (1949); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect,* 22 Ill. 2d 375, 179 N.E.2d 799 (1961); *Jordan v. Village of Menomonee Falls,* 28 Wis. 2d 608, 617-18, 137 N.W.2d 442, 447 (1965), *appeal dismissed,* 385 U.S. 4 (1966).

"Development fees" are a direct outgrowth of these types of dedication requirements. Many statutes and local ordinances give developers or subdividers the option of paying an "*in lieu*" fee in order to finance the sort of public improvements that would otherwise have justified a dedication condition. *See Call v. City of West Jordan,* 614 P.2d 1257, 1258 (Utah 1980); *Collis v. Bloomington,* 310 Minn. 5, 246 N.W.2d 19 (1976); *Briar West, Inc. v. Lincoln,* 206 Neb. 172, 291 N.W.2d 730 (1980); *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 (Tex. 1984). Fees have also been used *in lieu* of dedication where the burden posed by cumulative development and addressed through the development condition required the acquisition of offsite facilities such as schools or park and recreation facilities. *Associated Home Builders, Inc. v. City of Walnut Creek,* 4 Cal. 3d 633, 484 P.2d 606, *appeal dismissed,* 404 U.S. 878 (1971); *McLain Western #1 v. County of San Diego,* 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (1983); *Trent Meredith, Inc. v. City of Oxnard,* 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981); *Jenad, Inc. v. Village of Scarsdale,* 18 N.Y.2d 78, 218 N.E.2d 673, 676 (1966).

Consistent with their origin in "dedication" conditions, development fees enacted heretofore by state and local governments, *without exception,* have been limited to financing the acquisition of land or the construction of real improvements or facilities. The rationale for these exactions has been uniformly stated in the following terms. New development places a special burden upon local government by requiring the acquisition of additional "infrastructure" in the form of streets, sewer systems, schools, parks and other *improvements or facilities.* Because the need for these facilities is caused by the subdivision or other project for which a permit is sought (or that project in combination with other cumulative development), and this property will specially benefit from the public improvements, it is reasonable to assign the costs of these new facilities to the property owner seeking a building permit. *See Town of Longboat Key v. Lands End, Ltd.,* 433 So. 2d 574, 576 (Fla. App. 1983); *Lampton v. Pinaire,* 610 S.W.2d 915, 919 (Ky. Ct. App. 1980); *Missouri ex rel. Noland v. St. Louis County,* 478 S.W.2d 363, 367 (Mo. 1972); *Briar West, Inc. v. City of Lincoln,* 206 Neb. 172, 291 N.W.2d 730, 731-33 (1980); *Longridge Builders, Inc. v. Planning Bd.,* 52 N.J. 348, 350-51, 245 A.2d 336, 337-38 (1968); *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 804 (Tex. 1984); *Board of Supervisors v. Rowe,* 216 Va. 128, 136-39, 216 S.E.2d 199, 207 (1975); *Jordan,* 28 Wis. 2d at 617.

No case has ever held that the proceeds of a development fee could be used to finance the "operating" or "service" costs of a municipality. An early leading article on the subject of development fees rejected this very notion. In Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 Yale L.J. 1119, 1121 (1964) the authors note the absence of any rationale that would support the use of development fees to collect the operating costs of providing a municipal service, stating:

> The revenue burden *for services* is cast equitably on *new and old residents.* The taxes of the old residents have been paying for a certain number of employees. New employees are added to service new residents. But the cost of the new

> employees probably is covered by the taxes levied on the new residents; hence the burden on older residents is not affected appreciably unless the newcomers demand increased service levels. In such case the old residents share equally in the increased levels (citation omitted) (emphasis added).[10]

The Takings Clause of the Fifth Amendment prohibits the inequity of the City's attempted use of the transit fee to finance its Municipal Railway. The transit fee violates the basic Fifth Amendment protection consistently identified in this Court's decisions of the last decade construing the Takings Clause. *Nollan v. California Coastal Comm'n,* 107 S. Ct. 3141, 3147 n.4 (1987); *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980); *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 82-83 (1980); *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 147-48 (1978) (Rehnquist, J., dissenting). As this Court has repeatedly stated, the Fifth Amendment

> prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him. *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325 (1893).

As stated in *Armstrong v. United States,* 364 U.S. 40, 49 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone

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[10] Ignoring these notions of equitable taxation, the transit fee assigns the operating costs of the Municipal Railway to new developers and ignores entirely the future property tax payments that will be generated by their office buildings. (Trial Exhibits 39 and 54.) This is particularly unfair in that under California's Proposition 13, the newly developed properties will also be required to make *higher effective property tax payments* than those buildings which are excluded from the fee. California Constitution, Article XIIIA, § 1.

> to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

The transit fee conditions the grant of a development permit upon a property owner's willingness to "ante up" monies to finance a public service that benefits all property owners and to defray costs that all property owners, not just developers, "cause" the Municipal Railway to incur. If a development fee could be used for these purposes, local governments would be free to condition building permits upon the forced contribution of funds for virtually any public service.[11] The "transit fee" is simply a form of prepaid property tax, discriminatorily applied to a handful of property owners.[12] It violates the central purpose underlying the Fifth Amendment's Takings Clause prohibition.

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[11] It is likely that local governments, particularly in post-Proposition 13 California, will view development fees as a fiscal panacea in light of the ruling below. *See Candid Enters., Inc.* v. *Grossmont Union High School Dist.*, 39 Cal. 3d 878, 882 (1985). The City has already enacted another office development fee, intended to finance *child care costs* allegedly generated by downtown office development. San Francisco Planning Code § 315.

[12] The mere labeling of an exaction as a development fee will not prevent judicial inquiry as to its true nature. An exaction denominated as a development fee violates the Fifth Amendment where, as here, it is a guise or substitute for taxation or "a forced contribution to general governmental revenues . . . " *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980). Local government cannot seize upon a property owner's application for a building permit as an opportunity to "extort" a contribution to meet that government's revenue requirements. *Nollan* v. *California Coastal Comm'n*, 107 S. Ct. 3141, 3148 (1987); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *J.E.D. Assocs., Inc.* v. *Town of Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981).

II

THE TAKINGS CLAUSE AND THE DUE PROCESS CLAUSE PROHIBIT AN EXACTION SUCH AS THE TRANSIT FEE THAT IS BASED UPON PROJECTIONS OF COSTS WHICH LOCAL GOVERNMENT MAY NEVER IN FACT INCUR

Even if it were appropriate to use a development fee to finance the Municipal Railway's deficit, the City's use of a lump sum exaction to collect "costs" which are projected over a 45-year period unreasonably impinges on the property owner's Fifth Amendment rights. A fee cannot be used to recoup entirely speculative costs. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155 (1980). This is precisely what the "lump sum" transit fee does. There is no certainty or even reasonable probability that all or any significant portion of the $5 per square foot fee collected by the City will actually be incurred as a "cost" over this 45-year period.[13]

Even if the City ultimately incurred the costs claimed to justify the $5 per square foot fee, this would only occur after many years. In the interim, property owners required to pay the fee would be deprived of the use of their money. The transit fee's use of the lump sum exaction is a naked attempt by the City to deprive developers of the use of their money, appropriating the value of that use for the City's own benefit. This aspect of the transit fee in itself violates the Fifth Amendment. *First English Evan. Luth. Church* v. *County of Los Angeles,* 107 S. Ct. 2378 (1987).[14]

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[13] Unlike other development fees, the transit fee provides no mechanism for adjustment of the $5 fee in the event that the projected costs upon which it is based do not eventuate. *J. W. Jones Cos. v. City of San Diego,* 157 Cal. App. 3d 745, 750, 203 Cal. Rptr. 580 (1984).

[14] Two state courts have struck down dedication conditions "for the purpose of 'banking' the land for use in a projected but unscheduled possible future use." *181 Incorporated* v. *Salem County Planning Bd.,* 133 N.J. Super. 350, 359, 336 A.2d 501, 506 (1975), *modified,* 140 N.J. Super. 247, 356 A.2d 34 (1976); *Simpson* v. *City of North Platte,* 206 Neb. 240, 292 N.W.2d 297, 301-02 (1980).

Even if the financing of the Municipal Railway's operating deficit were a legitimate object of a development fee, the means chosen to implement that object must be "reasonably necessary for the accomplishment of [that] purpose and not unduly oppressive on individuals." *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594-95 (1962), quoting *Lawton v. Steele,* 152 U.S. 133, 137 (1894). The transit fee cannot withstand scrutiny under this standard. There is *no* reason that the City could not annually compute and assess *as actually incurred* the costs it purports to recoup with the fee. By collecting 45-years' worth of merely projected costs in a lump sum, the City simply advances its revenue objectives at the expense of property owners' legitimate Fifth Amendment interests.

III

THE TRANSIT FEE VIOLATES THE EQUAL PROTECTION CLAUSE

The transit fee discriminates by assigning the cost of expanding mass transit, to meet the growing demands of an urban community only to developers of new downtown office space. The effect of the transit fee is to exempt all owners of property developed prior to 1979 from sharing in the City's claimed costs of this expansion—even though every square foot of existing office space in the downtown area has created and continues to contribute to the "peak demand" which generates the need for expansion of Municipal Railway service. (Trial Exhibit 54.)

Exactions such as the transit fee, which single out developers to pay for government services whose costs are equally caused and whose benefits are equally enjoyed by other property owners not specially taxed, discriminate in a manner that violates the Equal Protection Clause. *Nollan v. California Coastal Comm'n,* 107 S. Ct. 3141, 3147 n.4 (1987). The premise of the transit fee is that existing property owners or residents (presumably by virtue of their prior tax contributions) somehow acquire a higher right or entitlement to government services than is enjoyed by the new-

comer.[15] This Court struck down an Alaska statute apportioning state benefits on the basis of just such classification. As stated in *Zobel v. Williams*, 457 U.S. 55, 64 (1982):

> Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible (citations omitted).

CONCLUSION

For all the foregoing reasons, this Court should note probable jurisdiction of the Russ Building Partnership's appeal.

Respectfully submitted,

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September 23, 1987

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[15] For the reasons noted above, such a classification in the present case, where pre-existing property owners continue to "burden" the Municipal Railway in precisely the manner that new development is claimed to, is without any substantial economic rationale. *See* Heyman & Gilhool, *Increased Community Cost, supra,* 73 Yale L.J. at 1120-21.

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No. 87-398

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

RUSS BUILDING PARTNERSHIP,
a California Limited Partnership,
Appellant,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Appellee.

On Appeal from the Court of Appeal of the State of California

MOTION OF APPELLEE TO DISMISS FOR LACK OF JURISDICTION AND FOR LACK OF A PROPERLY PRESENTED, SUBSTANTIAL FEDERAL QUESTION

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Pursuant to Rule 16.1, the Appellee City and County of San Francisco moves to dismiss the appeal filed on behalf of Appellant Russ Building Partnership on the grounds that the appeal is not timely, the Takings Clause issue was not properly presented to the California Supreme Court, and in any event the federal issues presented are not substantial.

ARGUMENT

I

THIS APPEAL MUST BE DISMISSED AS UNTIMELY

The California Supreme Court entered two orders in this case. *See* Jur. Stmt. App. C (April 30, 1987); App. B (June 3, 1987). If Appellant's time for appeal ran from the second order, this

appeal would be timely; but because it ran from the first order, it is untimely.[1]

There were two cases, and hence two appeals, before the California courts. The first (*Russ Building*) dealt with the legality of San Francisco's Transit Impact Development Fee Ordinance. The second (*Pacific Gateway/Crocker National Bank*) challenged both the legality of the Ordinance *and* its applicability to two buildings whose permits were issued prior to its enactment but contained a condition that the City claimed rendered those projects subject to the subsequently-enacted Ordinance.[2]

These appeals arrived at the California Court of Appeal several months apart, and were separately briefed.[3] The Court of Appeal consolidated the two appeals for hearing and decision in that court. On January 20, 1987 it filed its opinion upholding the Ordinance (Jur. Stmt. App. A-1 to 11, A-16 to 23) but finding, in Section V of its opinion, that the Ordinance could not be applied retroactively to the Pacific Gateway and Crocker projects. *See id.* A-11 to 16.

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[1] The notice of appeal was filed on August 28, 1987. Jur. Stmt. App. E.

[2] Appellant describes Pacific Gateway and Crocker as "Appellees" in this Court. Jur. Stmt. at i n.*, 5. That statement is incorrect. Pacific Gateway and Crocker are not parties to this case and never have been. Their separate case is now pending before the California Supreme Court, and was argued in that court on September 8, 1987. A decision may not be forthcoming for several months.

In that regard, shortly before the printing of this brief we received a copy of a document entitled "Appellees' Response In Support of Appellant's Jurisdictional Statement" filed by Pacific Gateway and Crocker. Because they are not parties to this appeal, that paper is unauthorized; accordingly, the City has filed a separate motion in this Court to strike it.

[3] Briefing in *Russ Building* was completed on April 18, 1986. *Pacific Gateway*, which had remained behind in the trial court for trial on the issues it did not have in common with *Russ Building* until judgment was entered on November 4, 1985, was not fully briefed in the Court of Appeal until June 6, 1986.

Appellee City filed a Petition for Review in the California Supreme Court in *Pacific Gateway/Crocker* limited to the issue of whether the Ordinance could be applied to those two projects.[4] Appellant filed a Petition For Review in *Russ Building*, seeking review of various issues going to the legality of the Ordinance itself.

On April 30, 1987, the Supreme Court of California entered the following order:

"Petitions for review GRANTED.

> "Pursuant to rule 29.2(b) of the California Rules of Court, review is limited to and briefs on the merits are to be confined to the following issues, discussed in Part V of the opinion of the Court of Appeal: (1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued.
>
> "Review shall not extend to the issues raised in the answers to the petitions for review." (Jur. Stmt. App. C)

The order confined review in the California Supreme Court to two issues raised in the City's Petition (both of which went to the question of whether the Ordinance could be applied to the two projects approved prior to its enactment) and refused review of the issues raised in Appellant Russ Building's petition (*i.e.*, whether the Ordinance was lawful).[5] Indeed, it expressly specified the two issues which it would review, neither of which was remotely within those raised by Appellant's petition (which had nothing to do with the issue of retroactive application).

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[4] Pacific Gateway and Crocker opposed the petition but urged that, if it was granted, the Court *also* consider various issues going to the legality of the Ordinance itself.

[5] In the last paragraph of its Order, the Supreme Court also declined to review the additional issues relating to the Ordinance's legality raised in Pacific Gateway/Crocker's Answer to Petition For Review. *See* note 4, *supra*.

Appellant (joined by the City) thereafter wrote the California Supreme Court asking it to state expressly whether or not the petition for review in *Russ Building* had been denied. App. A, *infra*.[6] On June 3, 1987, the California Supreme Court confirmed that its prior order had indeed denied the petition:

> "The order granting review is hereby modified: Petition for review by Russ Building Partnership DENIED. Petition for review by the City and County of San Francisco GRANTED.
>
> "Pursuant to rule 29.2(b) of the California Rules of Court, review is limited to and briefs on the merits are to be confined to the following issues, discussed in Part V of the opinion of the Court of Appeal: (1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued.
>
> "Review shall not extend to the issues raised in the answers to the petitions for review." (Jur. Stmt. App. B)

The second and third paragraphs of this order—in which the California Supreme Court states that "review is limited to" issues raised only in *Pacific Gateway/Crocker*—are identical to the prior order. The revision to the first paragraph merely makes explicit the denial of the Russ Building Petition for Review. Significantly, when this order was filed, Appellant had nearly two months to file its notice of appeal from the April 30 order. *See* 28 U.S.C. § 2101(c).

Although the April 30 Order did not expressly include the words "petition denied" in dealing with the *Russ Building* case, it made clear that review indeed had been denied for *all* of the issues raised in the petition filed in the *Russ Building* case, and limited review to the "retroactivity" issues raised only in *Pacific*

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[6] This informal letter was not a motion for reconsideration or rehearing. Indeed, such a motion is not authorized by the California Rules of Court with respect to the denial of a petition for review. The parties had no way of knowing whether the court would even respond to the letter.

Gateway/Crocker, none of which was raised by Appellant and none of which could have an impact upon it. At that juncture, Appellant had a final decision from the highest California court concluding the litigation on every issue raised by and/or possibly affecting it. There was, therefore, a final judgment in *Russ Building* as of April 30, 1987, and the time for appeal began to run on that date.

The subsequent order of the California Supreme Court on June 3 does not alter this conclusion. That order merely made the denial of Appellant's petition explicit. But the "mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which review must be sought." *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (quoting *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952)). Under that standard, the issue is whether the second order "*disturbed or revised* legal rights and obligations which, by its prior order, had been plainly and properly settled with finality." *Honeywell, supra*, 344 U.S. at 212 (emphasis added).

In the present case, the second order did not "disturb or revise" rights which had been settled by the first. The first order did not grant Appellant's petition; indeed, it did the opposite by refusing to consider any of the issues raised in Appellant's petition or any issues which would affect Appellant. Thus the second order—which at most made explicit a denial which was obviously implicit in the first—confirmed, and in no way "revise[d]", the original April 30 Order. As the Court observed in *Honeywell*:

> "[W]e do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases when review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of these time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." (*Id.* at 213)

The present case is indistinguishable from *Department of Banking v. Pink*, 317 U.S. 264 (1942), which the Court cited with approval in *Honeywell*, 344 U.S. at 211 n.9. In *Pink*, certiorari was sought after the New York Court of Appeals had affirmed a lower court's judgment. After entry of that affirmance, a motion was filed asking the state court to amend its remittitur by adding a statement that the federal question had been presented to and decided by it; the request was granted and the remittitur was so amended. This Court held that the petition, which had been filed within 90 days of the second order but not the first, was untimely:

> "Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; what was sought was merely the court's certification that a federal question had been presented to it for decision, and this could have no different effect on the finality of the judgment than a like amendment of the court's opinion." (317 U.S. at 266)

The Court added that

> "[f]or purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final [citations], but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court. (*Id.* at 268)

In this case, as in *Pink*, no motion for reconsideration or rehearing was filed.[7] The letter sent to the California Supreme Court requesting that the Court expressly indicate whether the petition for review had been denied "did not seek to have the [Supreme Court] reconsider any question decided in the case." *Pink*, *supra*, 317 U.S. at 266. "The final judgment already *rendered* was not challenged . . . ." *Id.*

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[7] Indeed, as previously noted, such a motion is not authorized in California. *See* note 6, *supra*.

Nor does this case fall within the exception to the *Honeywell* principle applicable "when the lower court changes matters of substance, or resolves a genuine ambiguity." *Honeywell*, 344 U.S. at 211. Both the example cited in *Honeywell* (*Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952)) and those cases which have followed it[8] involved substantive modifications to the original decision. In *Honeywell*, the Court distinguished between such cases and those in which "a judgment previously entered has been reentered or revised in an immaterial way" and held that a modification in the latter category "does not toll the time within which review must be sought." 344 U.S. at 211 (citing *Department of Banking v. Pink*, *supra*).

When the California Supreme Court issued its second order on June 3, 1987, only 34 days had elapsed since the first order of April 30. Nearly two months remained before the deadline of July 29, 1987 for noticing an appeal to this Court. This appeal was not filed until August 28, 1987 and is therefore untimely.

II

THIS APPEAL MUST BE DISMISSED WITH RESPECT TO THE TAKINGS CLAUSE ISSUE BECAUSE APPELLANT FAILED TO RAISE THAT CLAIM IN THE STATE COURTS

The Jurisdictional Statement omits the usual section describing how the federal question was raised at every stage of the proceedings, especially in the state's highest court. This was not an oversight, as Appellant did not raise the "taking" question in the California Supreme Court or, for that matter, at any other appropriate stage of the proceedings below.

Although the "taking" claim was raised in the separate complaint filed in the *Pacific Gateway/Crocker* case, it was *not* raised in *this* case. It was not raised in the *Russ Building* complaint or in

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[8] *See Burlington Northern Inc. v. United States*, 459 U.S. 131, 138 n.5 (1982); *Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

the extensive pre-trial and post-trial briefing.[9] It was not raised in Russ Building's briefs to the Court of Appeal or in a petition for rehearing from its decision upholding the Transit Fee. Most significantly, it was not raised in Russ Building's Petition For Review filed in the California Supreme Court, which that court denied.

Appellant invokes the principle that "'where the state court has considered and decided the constitutional claim, [this Court] need not consider how or when the question was raised.'" Jur. Stmt. at 3 n.1, quoting *First English Evangelical Lutheran Church v. City of Los Angeles*, — U.S. —, 55 U.S.L.W. 4781 (June 9, 1987). Although Appellant does not explain the significance of that statement, we presume its position is that the "taking" issue was decided by the Court of Appeal in its single opinion for both the *Pacific Gateway/Crocker* case and the *Russ Building* case. It is doubtful that the Court of Appeal decided the taking issue at all; but if it did, it could only have done so in the *Pacific Gateway/Crocker* case, and not in *Russ Building* in which the issue had not been raised or briefed.[10] But even if the Court of

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[9] That claim was belatedly raised in a post-trial motion after the trial court had ruled against Appellant. *See* Clerk's Transcript 1545. It was never alluded to again by Appellant until *after* the California Supreme Court had denied review in this case when Appellant wrote a letter in the *Pacific Gateway/Crocker* case supporting a request by Pacific Legal Foundation, appearing as an *amicus curae*, that the court expand the issues under review in that case.

[10] Although the appellants in *Pacific Gateway/Crocker* did raise the "taking" claim in their briefs, the Court of Appeal made only a passing reference to that claim in its opinion. *See* Jur. Stmt. App. A-9; *compare id.* at A-23 (summarizing its holding without mention of "taking" issue). To the extent the Court of Appeal's opinion may be read as having decided the taking issue, it could only have done so in deciding the *Pacific Gateway/Crocker* appeal and not in the *Russ Building* appeal, as the California appellate courts ordinarily consider questions abandoned unless they are raised, briefed and supported by citation of authority. *See, e.g., Traensegaard v. Silvercrest Indus., Inc.*, 175 Cal. App. 3d 218, 228 (1985); 9 B. Witkin, *California Procedure*, Appeal § 479 (3d ed. 1985).

Appeal had decided that issue, and even if it had done so in *this* case, that would only be of assistance to Appellant *if* the California Court of Appeal was the highest court in the California judicial system; of course it is not. Appellant was required to raise the "taking" claim in the Supreme Court of California. 28 U.S.C. § 1257; *Banks v. California*, 395 U.S. 708 (1969). Its failure to do so is fatal to its attempt to raise that issue here.

Appellant may respond that counsel for Pacific Gateway/Crocker raised the taking question in a brief filed in the California Supreme Court. *See* note 4, *Supra*. That cannot assist Appellant, which undeniably failed to raise the issue in *its* petition to the state's highest court.[11] *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 25 (1924) (party which failed to raise federal question below cannot seek review here even though co-party raised issue below); *Sully v. American National Bank*, 178 U.S. 289, 297-98 (1900) (same).[12] For these reasons, the "taking" issue is not properly before this Court.

III

THIS APPEAL MUST BE DISMISSED BECAUSE THE FEDERAL QUESTIONS PRESENTED BY APPELLANT ARE NOT SUBSTANTIAL AND WERE CORRECTLY DECIDED BELOW

Whatever importance may attach to the state law issues decided in this case, the federal questions presented (even assuming, contrary to the arguments above, that the Takings Clause question is properly presented) are not substantial. As the following discussion shows, the opinions below correctly resolved the federal questions. Appellant's contrary argument ultimately

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[11] As that assertion can only be verified by an examination of the entire document, we have lodged with the Clerk a certified copy of Russ Building's Petition For Review.

[12] Moreover, although the Court of Appeal had for convenience consolidated the two cases for oral argument and briefing, they were indeed two separate cases. Briefing was complete in the *Russ Building* case prior to the consolidation and, therefore, the scope of the issues presented in that case had already been determined.

rests on the unsupportable proposition that there is a distinction of constitutional magnitude between a finding of fact which is "rational" and one which is "reasonable."

The Transit Impact Development Fee Ordinance was enacted by the City and County of San Francisco in May 1981. It is designed to collect from developers of new office space in a defined area of downtown San Francisco an amount sufficient to defray the increased costs the City's public transit system would incur in providing the increased peak period transit service necessary to accommodate increased ridership resulting from the new office development during its lifetime, subject to a five dollar per square foot cap.[13] Ord. §§ 38.3, 38.4 (Jur. Stmt. App. F-3 to 5) In enacting the Ordinance, San Francisco was very much aware of the requirement that the fee must advance a legitimate public purpose. The legislation itself described the nexus:

> "New developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers. Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods.
>
> "This increased demand must be met not only by the acquisition of new rolling stock and the addition of new services, but also by the employment of additional personnel and fuel to operate the added facilities, and the maintenance, repair and replacement of the additional facilities as they wear out or become obsolete.
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> "That level of additional costs incurred by the City in expanding and operating, maintaining, repairing and replacing its public transit facilities to accommodate the additional peak-period person-trips generated by office use in new

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[13] Absent that legislative limit, the trial court determined that the Board of Supervisors could have set the fee in excess of $7.50 per square foot. Jur. Stmt. App. D-25 to 26.

> developments can be translated into a cost per gross square foot of office use in the new developments. The cost of expanding current services and adding new services is directly proportional to the amount of peak-period Municipal Railway travel generated by new development." (Ord. § 38.2 (Jur. Stmt. App. G-3))

Indeed, to be absolutely certain that the fee could be used for no purpose other than advancing the specific public end of mitigating the adverse impact on peak-period public transit of new office development, the Ordinance required that "sums derived from the collection of the Transit Impact Development Fee shall be held in trust" with the proceeds to

> "be used only for the provision of peak-period public transit service over and above public transit service being provided on March 1, 1980, to and from and within the downtown area, to compensate for and to defray the capital and operating costs incurred by the City in providing the benefit of public transit service in the downtown area in order to meet the special peak-period burden placed on the City by the addition of new office use in new developments in the downtown area of the City." (Ord. § 38.7 (Jur. Stmt. App. F-10 to 11))[14]

In setting the amount of the fee, the Board of Supervisors relied on a cost analysis prepared by a staff economist and an independent cost study prepared by Touche Ross & Co., both of which studies the Board of Supervisors approved after public hearings. Jur. Stmt. App. G-8. Thus, the legislature made findings, based on two separate, sophisticated analyses, that the costs the City would incur would in fact exceed the five dollar fee by a substantial amount.

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[14] This limitation on the use of the Transit Fee, which is not even mentioned in Appellant's Jurisdictional Statement, removes any incentive for collecting more than the costs of services to be provided and prevents application of any proceeds to the general revenue needs of the City.

Notwithstanding these legislative findings of fact, the trial court permitted Appellant to explore every conceivable detail of the cost analyses in the course of a 45-day trial. The trial court carefully considered the evidence and, in an opinion taking 31 printed pages in Appellant's Appendix D, held that the legislatively-found facts had a rational basis (Jur. Stmt. App. D-21) and that "[i]f the court were to assume *arguendo* that the City may not extract a development fee which exceeds the Muni's actual incremental cost" of providing transit service to new office buildings, then that actual cost is at least $7.55 per square foot. *Id.* D-26.

On appeal, Appellant argued vigorously, as it does here, that the rational basis standard for reviewing legislative facts was illusory and that the proper standard was that the findings must be "reasonable."[15] The Court of Appeal, however, upheld the trial court's opinion, holding that "the charge levied is directly related and limited to the costs of increased municipal transportation services engendered by the particular development" and that "the City has undertaken numerous studies and has held public hearings to determine the *reasonable* costs of the increased transit services." Jur. Stmt. App. A-6 (emphasis supplied). The Court of Appeal refused to indulge in Appellant's semantic exercise, recognizing instead that "rational" and "reasonable" are synonymous and may be used interchangeably. For example, the Court of Appeal wrote that "[t]he trial court found that the 45-year forecast was *reasonable* as it '*rationally* and directly related' to the estimated life of the buildings." Jur. Stmt. App. A-16 (emphasis supplied). *See also id.* at A-22 (Court of Appeal repeatedly refers to trial court as having decided whether legislatively found facts were "reasonable.")

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[15] Appellant did not argue below, and does not argue here, that the Court is required to hold a trial *de novo* and make an independent judgment as to the correctness of the facts found by the legislature. Instead, it argues that the court must determine only whether the estimate of transit costs was "reasonable." Jur. Stmt. at 9, 10 n.9. As discussed in Section III(A)(2), *infra*, there is no distinction as a matter of law between the standard for which Appellant argues and the standard the court applied.

Significantly, the Court of Appeal destroyed Appellant's argument that the state court's standard of review was illusory and erroneous by *overturning* two aspects of the Transit Fee cost calculation. *Id.* at A-21 to 22. The court did so based on the very standard of reasonableness which Appellant claims should have been used:

> "This, plaintiff claims, *unreasonably* inflated the fast pass/cash ratio and yielded underestimated revenue. We agree." *Id.* at A-21 (emphasis supplied).[16]

Thus, the Court of Appeal not only demonstrated that it was applying exactly the standard of review for which Appellant had argued, but that the standard has teeth and will preclude a municipality from setting a fee in an arbitrary amount.

The California Supreme Court denied Appellant's petition for review of the two federal issues Appellant presented—substantive due process and equal protection.

For the reasons which follow, the California Court of Appeal's decision presents no substantial federal question.

A. Even If The Takings Clause Issue Were Properly Before This Court, It Would Not Present A Substantial Question

Appellant's belated argument that the Transit Impact Development Fee violates the Takings Clause of the United States Constitution is premised on this Court's recent decision in *Nollan v. California Coastal Commission*, — U.S. —, 55 U.S.L.W. 5145 (June 26, 1987). In particular, Appellant argues that because *Nollan* requires that a condition imposed on the grant of a land-use permit must "substantially advance legitimate state interests" (*id.* at 5147), it somehow follows that the Transit Fee cannot be upheld unless a "reasonable estimate" (Jur. Stmt. at 9) of the financial burden exceeds the fee imposed as a condition of development. Therefore, Appellant argues, the courts were re-

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[16] Having found that there were two errors in the cost calculation, however, the Court of Appeal went on to determine that the errors were harmless and that correcting the calculation would still leave the cost well above $5 per square foot. Jur. Stmt. App. A-23.

quired to determine whether the factual findings supporting the Transit Fee were "reasonable," as opposed to "rational." In fact, as shown in Section III(A)(2), *infra*, there is no distinction between the two tests, and the state courts applied exactly the test Appellant advocates. As a prelude to that analysis, however, we show in Section III(A)(1), *infra*, that *Nollan* does not impose any requirement with respect to the calculation of the amount of a fee, and that the Transit Fee fully satisfies the nexus requirement *Nollan* does impose. For both of these reasons, even if Appellant had raised this issue below, the decision of the California courts was correct and presents no substantial federal question warranting review in this court.

1. It Is Clear From The Record, And The State Courts Have Already Held, That The Transit Fee Substantially Advances The Legitimate State Purpose For Which It Was Imposed, And The Takings Clause Requires Nothing More Of A Condition On Development

Nollan held that the Takings Clause is satisfied so long as a condition on development substantially advances the legitimate state purpose for which it is imposed. 55 U.S.L.W. at 5147. Here, as shown in subsection (a) *infra*, the Transit Fee meets that standard. As shown in subsection (b), *Nollan* does not speak to the issue of the *amount* of a fee which is found to advance a legitimate purpose, let alone the standard of review by which a court determines whether to uphold a legislatively-found fact. Nor does it replace normal rules of deference to the legislative fact-finding process with a requirement that the courts serve as Supreme Boards of Accountancy regarding the amount of a development fee.

a. There Is A Sufficient Nexus Between The Transit Fee And The Legislative Purpose For Which It Was Imposed

This is simply not a case such as *Nollan* where the courts are presented with the task of trying to discern from a silent record the legislative purpose for imposing a condition and then attempting to determine whether there is an adequate relationship between that purpose and that condition. Here, as explained at

pp. 10-11, *supra*, the San Francisco Board of Supervisors stated its purpose expressly. The Transit Fee was adopted to defray the increased public transit costs which would be imposed on the City by new office development. At no time in this litigation has there been any question as to whether the State's purpose was legitimate. Nor can there be any question as to whether the Transit Fee substantially advances that purpose. The Transit Fee is exactly tailored to advance its purpose. It is calculated on the basis of the additional burden imposed as a result of new office development, and *the ordinance prohibits expenditure of any of the proceeds for any purpose other than providing additional transit service to serve that expanded demand. See* p. 11, *supra*.[17]

Not only is it clear from the record that the Transit Fee is exactly tailored to serve the legitimate state purpose, but the California courts have expressly so found. The trial court held:

> "Since the objective of providing adequate public transportation is a legitimate governmental objective, this Court must determine whether there is a sufficient nexus between the stated objective and the extraction of TIDF fee. The TIDF specifically states that the funds may not be used except to meet the increased demand for peak-period transit facilities created by new office development. (TIDF Section 38.7) Since the need for additional public transportation has been shown by the evidence to be directly related to the construction of new offices, there is a sufficient nexus." (Jur. Stmt. App. D-7)

The Court of Appeal was just as clear, holding that the Transit Fee "is directly related and limited to the costs of increased municipal transportation services engendered by the particular

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[17] Thus, the Ordinance itself precludes the possibility that the developers paying the Fee will be providing extra revenue for unrelated transit service or making a forced contribution to general governmental revenues (Jur. Stmt. at 10) through its requirement that proceeds of the Fee can be used for no other purpose than meeting the exact evil to which the condition is addressed.

development. . . ." *Id.* at A-6.[18] Thus, the *Nollan* requirement that the condition "substantially advance" the legitimate governmental purpose plainly was met in this case.

b. Nollan Does Not Speak To The Issue Of The Amount Of A Fee Which Substantially Advances A Legitimate Purpose, Let Alone The Standard By Which Courts Review Legislatively-Determined Facts Regarding Its Calculation

Nothing in *Nollan* or any other Takings Clause case has ever addressed the issue of the amount of a fee imposed as a condition on development or the standard of review by which the courts must evaluate the legislatively-found facts regarding its calculation in order to determine whether a taking has occurred.[19] *Nollan* held that a condition on development creating an easement across the plaintiff's beachfront was a taking because it would not advance the purpose of increasing visual access from the street. *Nollan* does not inquire into the issue of the extent to which construction of a new house might impair public access to the beach, and made clear that no such inquiry was necessary for purposes of Takings Clause analysis. In *Nollan* the Coastal Commission would have been free to impose *any* condition which protected the public's ability to see the beach from the street even

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[18] As is clear from the state courts' opinions, they did not rely on the "debatably rational" factual standard of review in determining the existence of a nexus.

[19] *Norwood v. Baker*, 172 U.S. 269 (1898) does not support applying the *Nollan* holding to review of the amount of a fee imposed as a condition of development. *Norwood* did not involve a condition on development where the government has the power to grant or withhold a permit in its discretion, the situation which pertained in *Nollan* and pertains here. *Norwood* involved a special assessment district where the justification for imposition of an exaction and, therefore, the measure of the permissible exaction, is the conferring of special benefit upon the property owner.

if that condition constituted a permanent grant of continuous access to part of the property. 55 U.S.L.W. at 5147.[20]

Nollan did not require for Takings Clause purposes that there be any effort to measure the amount by which visual access to the beach had been impaired or to limit the access for viewing purposes to that "quantity" which would exactly restore the impairment. So long as the required nexus exists, the Takings Clause leaves the issue of the amount of the fee to the legislative process as reviewed under appropriate principles and standards by the state courts.[21] Although state law may require that the amount of the fee not exceed the cost of the services to be provided,[22] the Takings Clause is satisfied so long as the condition substantially advances the governmental purpose for which it is imposed. *Nollan*, 55 U.S.L.W. at 5147.

Even as to those facts which were relevant to the Court's analysis, *Nollan* did not impose any new or higher standard of review. *Nollan* took as given the facts found by the Coastal

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[20] That is so because this Court assumed the Coastal Commission had the power to forbid construction of a new house altogether. Here, Appellee had the power to deny Appellant's permits and so, as in *Nollan*, Appellee had the right to impose a lesser condition without contravening the Takings Clause so long as that condition substantially advanced the legitimate state interest for which it was imposed.

[21] This approach is entirely reasonable given that payment of the Transit Impact Development Fee is voluntary in the sense that an owner of property in downtown San Francisco who deems the fee too great is free to continue the existing use or engage in development of any use other than new office space without subjecting himself to the fee. *Ayres v. City Council*, 34 Cal. 2d 31, 42 (1949). Thus, the Transit Fee does not deprive any owner of the use of property.

[22] As we have noted, the trial court held that any requirement of law that would limit a development fee to actual cost was satisfied in this case because actual cost was at least $7.55 per square foot. Jur. Stmt. App. D-26. The Court of Appeal assumed that a fee could not exceed actual cost, disagreed with the trial court on two aspects of the cost calculation, and found that as adjusted by a correction of these errors the costs would fall to $6.95 per square foot. *Id.* at A-23.

Commission and reasoned from them. For example, *Nollan* did not question the finding that there would be visual impairment as a result of the new building or require a trial *de novo* of that finding. Certainly *Nollan* was not intended to require every court confronted with a challenge to a governmental exaction to engage in the intricate cost accounting necessary to replicate the work of the legislative body and to determine independently whether the amount of a fee is appropriate.[23]

2. In Any Event, There Is No Constitutional Distinction Between A Determination Which Is "Rational" And One Which Is "Reasonable"

Even if Appellant were correct that the Takings Clause requires courts to delve into cost-accounting, its argument would still fail because the courts below determined that the Fee was less than the cost of services by applying exactly the standard of review which Appellant advocates. Appellant contends that there is a distinction for constitutional purposes between a fact which is "rational" and a fact which is "reasonable."[24] No such distinction exists in the law. Resort to any dictionary confirms the obvious: "rational" is defined in terms of having, exercising, manifesting, or being based on "reason" and "reasonable" is defined in terms

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[23] This is consistent with the teaching of *Nollan*'s footnote 3. That footnote did not address the standard by which legislatively-found facts are to be reviewed. Instead, it addressed the test by which the existence of a nexus must be determined. It held that the condition must in fact "substantially advance" the "legitimate state interests" and that it would not be sufficient to establish a nexus that the state "could rationally have decided that such a nexus exists." The note distinguished the Takings Clause nexus review from the minimum rationality test which governs substantive due process and equal protection cases where the courts attempt to determine after the fact whether there is any possible legitimate State purpose that could be served by the legislation at issue.

[24] The addition of the term "debatable" in no way alters the test. Lawyers and courts often express the same thought with the word "arguable." This term simply recognizes the obvious—that someone will be prepared to controvert virtually any statement and that no legislation could be adopted if it were required to be based on facts which were beyond debate.

of being "rational." *See, e.g., American Heritage Dictionary of the English Language 1083, 1086 (1981)*. As shown above, the California Court of Appeal based its opinion on this same understanding, defining "reasonable" as "rationally and directly related" (Jur. Stmt. App. A-16) and describing the trial court's findings based on the debatable rational basis standard as having found that the cost analysis was reasonable. *Id.* at A-6, 22.

This Court, too, has repeatedly used the terms "rational" and "reasonable" interchangeably. For example, where an administrative determination must have "a reasonable basis in the law . . ., the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Dobson v. Commission of Internal Revenue*, 320 U.S. 489, 501 (1943), *quoting Rochester Telephone Corp. v. United States*, 307 U.S. 125, 146 (1939). Similarly, Justice Holmes, writing in dissent in *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389, 406 (1928), wrote: "We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor." *Compare Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 54 U.S.L.W. 4755, 4757 (June 25, 1986) (looking to a "reasonable jury"), with *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 54 U.S.L.W. 4319, 4322, 4326 (March 26, 1986) (in which the same test looks to a "rational trier of fact"). *See also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (Court will not substitute its judgment for that of the legislature as to the existence of a public use unless the legislature's judgment is "palpably without reasonable foundation," and test is satisfied where the legislative act is "rationally related" to a conceivable public purpose).

Therefore, even if Appellant were correct that *Nollan* imposes a Takings Clause requirement that the amount of the Transit Fee be "reasonably related" to the costs of providing transit service (Jur. Stmt. at 10-11), the state courts have determined that such a standard was met.

B. No Substantial Issue Is Presented With Respect To Whether The Transit Impact Development Fee Violates The Due Process Or Equal Protection Clauses

It is well-established, and Appellant does not argue otherwise, that to satisfy the Due Process and Equal Protection Clauses, a development fee or a classification establishing such a fee need only bear some reasonable relation to the evils to be eradicated or the advantages to be secured. *See* Jur. Stmt. at 12-13. Moreover, as *Nollan* itself recognized, where regulation of property is at issue the standards for equal protection and due process challenges are less onerous than for a takings challenge, and it is enough that the state could rationally have decided that the measure might achieve the state's objective. 55 U.S.L.W. at 5147, n.3.

Appellant argues that the Transit Fee violates due process because costs cannot be projected with certainty over a 45-year period and denies Equal Protection because it excludes retail development. The state court considered both of these arguments and rejected them in the face of the clear nexus discussed above between the Transit Fee and the legitimate governmental purpose for which it was imposed. The California Court of Appeal decided that the 45-year forecast "was not arbitrary or unreasonable" (Jur. Stmt. App. A-9) and "was supported by substantial evidence." *Id.* at A-17.[25]

As for the equal protection claim, the Ordinance itself explains why the fee was not also imposed on new retail space or other uses:

> "Even though other uses such as retail use also generate Municipal Railway peak-period person trips (and even if a particular alternate use were to generate more such trips than do office uses), the Board refrains from imposing the Transit

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[25] We have not undertaken to summarize the voluminous evidence presented to the California courts regarding the basis for, and reliability of, the cost projections. Suffice it to say that the issue was thoroughly explored in the trial court (*see, e.g.*, Jur. Stmt. App. D-10 to D-28), and in the appellate briefs filed in the California Court of Appeal, as well as in that court's opinion.

> Impact Development Fee on such uses at this time, and in that regard finds: (1) The vast majority of new commercial space in the downtown area will be devoted to office uses, and the primary cause for new peak-period Municipal Railway passengers will be the development of new office uses; and (2) a significant proportion of the new retail and service uses which will hereafter be developed in the downtown area will be constructed in connection with new office developments and, for that reason, limitation of the Fee to office uses both ameliorates the economic impact of the Fee on developers of office space and encourages the development of projects with mixed uses consisting of office, retail and service uses." (Ordinance § 38.2 (Jur. Stmt. App. G-4))

The Court of Appeal upheld the legislative finding that office space, and not retail space, is primarily responsible for the need for increased peak period transit services in San Francisco[26] and concluded that the imposition of the fee on office space "must be upheld as being directly and additionally related to legitimate governmental goals." *Id.* at A-8. Its rejection of the equal protection claim was correct and raises no substantial federal question.

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[26] The court noted that projected new office space was nearly ten times that of projected new retail space, and that the City could "rationally decide to focus its attack on the problem of funding the costs of additional transit facilities on the type of real property development creating the greatest increase in peak period ridership." Jur. Stmt. App D-29.

CONCLUSION

For all of the reasons stated above, Appellant's appeal must be dismissed because it is untimely. The Takings Clause issue has not been properly preserved and is not properly before this Court. In the alternative, the judgment of the California courts should be affirmed because it is clear from the record below and the decisions of the California courts that the Transit Impact Development Fee is not contrary to the Takings Clause, the Due Process Clause, or the Equal Protection Clause of the United States Constitution.

DATED: September 30, 1987.

Respectfully submitted,

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Appendix A

May 7, 1987

Clerk, Supreme Court of the
State of California
455 Golden Gate Avenue
San Francisco, CA 94102

Re: *Russ Building Partnership* v. *City & County of San Francisco, No. A030997; and Crocker National Bank, et al. and Pacific Gateway Associates Joint Venture v. City & County of San Francisco, No. A033493*

Dear Sir:

This letter is written in the above cases on behalf of Petitioner Russ Building Partnership, Petitioner, and Respondent City and County of San Francisco, and Respondents Pacific Gateway Associates Joint Venture, et al., with respect to the order granting review filed April 30, 1987, by this Court (a copy of which is enclosed).

These are petitions filed in two separate cases which were treated as consolidated in the trial court, were heard on the same day by the Court of Appeal and decided in a single opinion. In *Russ Building* (CA No. A030997), the petition was filed by plaintiff Russ Building Partnership. In *Pacific Gateway/Crocker* (CA No. A033493), the petition was filed by defendant City and County of San Francisco. The Court's order provides that "Petitions [plural] for review GRANTED" yet the limitation of issues is confined to issues raised only in the Petition for Review filed by the City in *Pacific Gateway/Crocker* (CA No. A033493). The parties respectfully request that the Court clarify its order in the following respects:

1. Did the Court intend to grant both petitions for review?

2. If so, has it granted review as to all issues raised in the petition filed by Russ Building Partnership? If not, to what issues (including issues raised in the City's answer to that petition) is review limited?

3. If the Court has not granted review in *Russ Building*, the parties request that the order expressly indicate that the petition for review in that case has been denied, so that it is clear for all purposes that the judgment in *Russ Building* is final. This clarification is important because, among other reasons, it would eliminate any uncertainty as to whether, if desired, review can be sought in the Supreme Court of the United States.

Clarification by the Court of the April 30 order would be helpful to all parties.

Respectfully submitted,

PILLSBURY, MADISON & SUTRO

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 87-398

Supreme Court, U.S.
FILED
OCT 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

RUSS BUILDING PARTNERSHIP,
a California general partnership,
Appellant,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, *et al.*,
Appellees.

On Appeal from the Court of Appeal of the State of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The City ignores the dangerous precedent that would result if the ruling below is allowed to stand. States and local governments would be free to circumvent the Takings Clause by conditioning the right to occupy or

develop property upon payment of exorbitant "fees" that have no reasonable relationship to any public burden caused by the development.

This Court has jurisdiction. The California Supreme Court's first order (April 30, 1987) was not a "final decision" from which appellant could have appealed (see Mot., p. 5), as that order expressly stated "[p]etitions for review GRANTED" (Jur.St., Appx. C). The second order (June 3, 1987) did not merely "confirm" the first order (see Mot., p. 5); the second order completely changed the disposition of appellant's petition for review from "granted" to "denied" (Compare Jur.St., Appx. C with Jur.St., Appx. B). Even if it were arguable that the first order was appealable, the time to appeal began to run from the second order which, in response to a request by all parties,

"'resolve[d] a genuine ambiguity in a judgment previously rendered'" (Burlington Northern Inc. v. United States (1982) 459 U.S. 131, 138, n. 5; quoting F.T.C. v. Minneapolis-Honeywell Co. (1952) 344 U.S. 206, 211-212).

The City does not dispute that the due process and equal protection issues were raised by appellant and decided below.[1] As to the Takings Clause issue, the City avoids coming to grips with the procedural history of the case: (1) appellant's case was tried in a consolidated trial with the Pacific

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1 The City makes no attempt to respond to appellant's argument on these issues that the ordinance is an attempt to shift the burden of paying for public transportation from taxpayers and passengers to a handful of property owners (Jur.St., pp. 12, 13; but see Pennell v. City of San Jose (1986) 42 Cal.3d 365, 372-373, n. 9, jurisdiction postponed (1987) 107 S.Ct. 1346 (pending U.S. Sup.Ct. No. 86-753)).

Gateway/ Crocker cases, except as to state claims not relevant here (Jur.St., Appx. D, p. 3), and the trial court decided the Takings claim; (2) the court of appeal decided appellant's case with the Pacific Gateway/ Crocker cases in a single, consolidated decision (Jur.St., Appx. A, p. 1; Order of court of appeal granting motion to consolidate (May 19, 1986)), which similarly decided the Takings claim ; and (3) the California Supreme Court has similarly treated the cases as consolidated and has decided the Takings claim by limiting its review to the issue of retroactivity of the ordinance, raised by the City's petition for review (see Jur.St., Appx. B and C).[2] Thus, the Takings Clause issue was

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2 Because Pacific Gateway Associates Joint Venture, Crocker National Bank,

(Footnote Continued)

raised in the consolidated proceedings in the trial court, court of appeal and California Supreme Court, and was decided by the state courts (Jur.St, Appx. A, p. 9; Jur.St., Appx. D, p. 8). "Where the state court has considered and decided the constitutional claim, we need not consider how or when the question was raised" (First English Evan. Luth. Ch. v. Los Angeles Cty. (1987) ___ U.S. ___, 107 S.Ct. 2378, 2385, n. 8).[3]

(Footnote Continued)

and Crocker Properties, Inc., were parties in all the consolidated proceedings below, they are appellees in this appeal pursuant to Rule 10.4 of the Rules of this Court.

3 This is not a case, as in the authority cited by the City, where appellant "did not ask the Supreme Court of California to review the judgment entered by the Court of Appeal in this case" (Banks v. California (1969) 395 U.S. 708, 708). Moreover, the City's argument that a party must

(Footnote Continued)

The Takings Clause issue is of crucial importance to property owners and to states and local governments throughout the country. There is no basis for the suggestion that the courts below applied a standard of review that satisfied the Takings Clause (Mot., pp. 18-19). The trial court found only that the transit fee ordinance had a "debatable rational basis" (Jur.St., Appx. D, pp. 13, 17, 18, 25), and the court of appeal affirmed those findings as supported by substantial evidence (Jur.St., Appx. A, p. 17). The City concedes that "someone will be prepared to controvert virtually any statement"

(Footnote Continued)

personally raise an issue in the state courts without relying on a co-party's raising of the issue (Mot., p. 9) relies entirely upon cases that pre-date the modern rule that it is enough that an issue has been considered and decided.

(Mot., p. 18, n. 24)--i.e., everything is "debatable" in the sense that term is used by the City and the courts below. Thus, the "debatable rational basis" test is illusory and allows fees to be set in any amount.

Nollan v. California Coastal Com'n (1987) ___ U.S. ___, 107 S.Ct. 3141 has rejected a "rational basis" test (and necessarily a "debatable rational basis" test) under the Takings Clause:

> "[O]ur verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved * * *, not that 'the State "could rationally have decided" the measure adopted might achieve the State's objective'" (107 S.Ct. 3147, n. 3; citation omitted).

The City's assertion that the "debatable rational basis" test used to sustain the fee was simply a different

way of expressing a "reasonableness" test for cost estimates (Mot., pp. 18-19) is disingenuous in light of the City's vigorous efforts to urge the trial court to reject a "reasonable cost" standard in favor of the City's "debatable rational basis" test. Accepting the City's argument, the trial court held that development fees were not subject to the reasonable cost limitations imposed by California law (California Government Code, § 50076), and therefore the California courts applied only the "debatable rational basis" test. As discussed in appellant's jurisdictional statement, California law expressly requires that development fees must not exceed the reasonable cost of providing the service for which the fee is charged (Jur.St., pp. 9-10). In asserting that the transit fee "is exactly tailored to serve the legitimate state purpose"

(Mot., p. 15; emphasis added), the City does not even attempt to respond to appellant's argument that a fee that exceeds the legislatively imposed limit cannot "substantially advance" a legitimate state interest (Jur.St., pp. 9-10).

This Court should resolve the important issue whether the Takings Clause limits the amount of fee exactions imposed by local governments and whether any meaningful standard of review should be applied in determining whether a fee exceeds an amount that substantially advances a legitimate state interest.

Respectfully submitted,

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